2017 FOURTH QUARTER

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 508

Turner v. Com., 2017 WL 5508759 (Ky. App. 2017)

FACTS: In April 2014, the Menifee County Sheriff's Office received a call about an old pickup truck stolen from private property. An alert was put out for it. A few days later, a truck of the same model, but a different color, was spotted driving erratically and at high speed in Lee County, and a constable attempted to stop it. Sheriff Childers (Lee County) joined the chase, and observed the truck strike a gas pump. Due to the smoke and dust, the pursuing officers could not see the driver who fled on foot. They realized the truck, now damaged, had originally been a different color and realized that it was the stolen truck. Officers found Turner hiding in a nearby dumpster, seriously injured.

Turner was charged with Fleeing and Evading and Wanton Endangerment, and was subsequently convicted. He then appealed.

ISSUE: Can destroying an item that could explode constitute Wanton Endangerment?

HOLDING: Yes

DISCUSSION: Turner argued that the charges constituted double jeopardy, but the Court disagreed, finding the Fleeing and Evading arose from the chase and the Wanton Endangerment charge from the striking of the gas pump. The Court agreed the facts warranted separate charges.

The Court also agreed that there was sufficient circumstantial evidence that Turner was driving the truck and that knocking down the gas pump caused a substantial risk of injury. The Court upheld the convictions.

PENAL CODE – KRS 509

Dungan v. Com., 2017 WL 5031354 (Ky. 2017)

FACTS: Dungan was charged with the sexual assault of his both physically and intellectually disabled stepdaughter, J.M. When caught in a sexually compromising position with her, he was ejected from the house by his wife (her mother). External swabs indicated that Dungan had, at the least, ejaculated on J.M., although internal swabs were negative. J.M. was questioned but her responses were inconsistent in different interviews, and with what she said at trial. At trial, the prosecution went over her statement in detail and she affirmed that he put "his thing" between her legs so she wouldn't get pregnant.

Ultimately Dungan was convicted of Rape, Incest and Adult Abuse. He appealed.

ISSUE: Is Rape and Abuse of an Adult double jeopardy?

HOLDING: No

DISCUSSION: Dungan argued that the Rape and Abuse of an Adult charges constituted double jeopardy. The Court agreed that since each requires an element that the other does not, it did not meet the Blockburger test and was not double jeopardy.[1] However, under Kentucky's stricter interpretation, the incident was part of a continuous course of conduct not interrupted by legal process. There was no discrete break in the crime, and under precedent, the Court vacated the lesser conviction (the rape) in favor of the Abuse of an Adult charge.

[1] Blockburger v. U.S., 284 U.S. 299 (1932).

The Court also agreed that the Commonwealth method of handling J.M.'s inconsistent statements was appropriate as was needed to handle her confusion. The Court affirmed the incest (due to her status as his stepdaughter) and abuse, but vacated the rape.

Taylor v. Com., 2017 WL 5034477 (Ky. 2017)

FACTS: On December 20, 2013, Johnson was murdered in Lexington and his body put into a barrel, which was then dumped into the Kentucky River. The last to see him alive were Taylor and Ballard, and according to Ballard, as he was driving, Taylor choked and murdered Johnson. (911 calls were made by third parties who reported what they saw of the fight inside the vehicle.) Taylor claimed that Ballard in fact did the beating and the murder. Both men were ultimately apprehended.

Taylor was convicted of murder and kidnapping. Taylor appealed.

ISSUE: May a person who moves their victim to commit a crime also be charged with Kidnapping?

HOLDING: Yes

DISCUSSION: Among other issues, Taylor agued he was entitled to the "kidnapping exemption" in KRS 509.050. The Court noted that when determining the applicability of kidnapping, "[t]his court employs a three-prong test."[2]

> First, the underlying ·.criminal purpose must be the commission of a crime defined outside of KRS 509. Second, ·the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime ... All three· prongs must be satisfied in order for the exemption to apply.

It was agreed that Taylor met the first and second prong, but there was dispute about the third, and most important, element.[3] During the discussion of the night's events, the facts indicated that they forced Johnson back into the car twice and covered some distance before Johnson died. That defeated his argument to apply the kidnapping exemption.

The Court also discussed the admission of evidence, via cellphone data and text messaging, as to the drug business engaged in by Taylor and Johnson, which provided relevant motive. Taylor argued that ""[b]eing forced to listen to three hours of barely relevant cell phone data and text messages necessarily provoked the jury's instinct to punish someone." The brunt of this argument is that being forced to listen to evidence somehow created ·a sense of ire intense enough to force the jury to lash

[2] Wood v. Com., 178 S.W.3d 500 (Ky. 2005) (citing Griffin v. Com., 576 S.W.2d 514 (Ky. 1978)). . .
[3] Stinnett v. Com., 364 S.W.3d 70 (Ky. 2011).

out at and punish Taylor." If anything, the court noted, it was monotonous, and boring, but not horrible. It did bring in evidence of his drug dealing, but Taylor himself discussed it openly during his own testimony. Such evidence was proper evidence of motive under KRE 404(b).

In addition, the Court agreed that it was proper to show the jury the actual barrel, rather than just photos and such. "It is akin to a murder weapon which is relevant to the case, even if there are photographs and testimonial descriptions of it." Nor was it changed in any way. The Court also agreed that the text messages and video evidence was property authenticated by investigators, who had personally collected it.

The Court upheld Taylor's conviction.

PENAL CODE – KRS 524

O'Bannon v. Com., 2017 WL 6380241 (Ky. 2017)

FACTS: O'Bannon, his son Tyson and Smith, Tyson's girlfriend, stopped to get gas. Realizing that Tyson had pulled up on the wrong side, O'Bannon told him to pull around, but in the meantime, Yates pulled in to the pump. A verbal argument began and Tyson moved to a different pump. O'Bannon and Yates continued to argue. Yates reached for something inside his car and the O'Bannons believed he was reaching for a firearm. They drove off. Yates called 911 reporting them for reckless driving. The O'Bannons returned, to ensure that they had paid for the gas, and a fight began. Witnesses differed on who was the initial aggressor. At some point, O'Bannon sliced Yates arm, causing a serious injury. The O'Bannons drove off, with O'Bannon tossing his blood shirt. O'Bannon turned himself in several days later.

O'Bannon was charged with several offenses, including Tampering with Physical Evidence. The knife had never been found and was possibly in the discarded bloody shirt. He was convicted of Assault and related offenses and appealed.

ISSUE: Is tossing away a crime weapon Tampering?

HOLDING: Yes

DISCUSSION: O'Bannon argued that he had been entitled to the defense of self-protection. The jury had been instructed on that defense, and the Court agreed that the witnesses provided a variety of differing accounts as to who was the aggressor, and particularly, who escalated the fight – when O'Bannon introduced a knife.

With respect to Tampering, the Court agreed that there was adequate evidence that O'Bannon deliberately disposed of the knife, either by throwing it out the window or losing it in some other way. Even though O'Bannon tried to introduce a knife in evidence as the one he'd used, the Court agreed it was proper for the jury to find that he had deliberately discarded the knife.

The Court upheld his convictions.

PENAL CODE – KRS 525

Roth v. Com., 2017 WL 4570565 (Ky. App. 2017)

FACTS: Roth bought four horses as a gift for a girlfriend, but she soon became an ex-girlfriend. Knowing nothing about horses, he hired Burke to care for them. He paid for supplies and care. Ultimately he sold or gave two of the horses to Burke, but all were housed on his farm, and they had pasture, water and shelter. Roth was seriously injured in a wreck but Burke continued caring for the horses, purchasing feed and vet bills while Roth was unavailable. When he was released, he decided to sell the remaining two horses and posted a photo on Craigslist. As the horses appeared skinny, Animal Control was notified about the underweight horses.

On July 29, 2013, ACO Stinson (Animal Control, Campbell County) visited the farm and found the horses underweight and their stalls dirty. They were, however, acceptable. Stinson was aware of the arrangement and left Roth a note that the horses needed to be checked by a vet. Another call a few weeks later brought Sgt. Halfhill to the farm, he contacted ACO Stinson who explained the situation. She found the horses in "noticeably worse condition, however. Halfhill was told by Roth that he was paying Burke to take care of them and Stinson agreed that Burke knew how to care for horses. Ultimately the horses were removed on August 27.

Roth was charged with Animal Cruelty. Stinson testified that she knew Roth had been injured but believed he should have done more. Halfhill testified that he believed that Roth's non-supervision of Burke constituted neglect. Burke testified that Roth paid the vet bills and purchased food and hay. She fed the horses twice a day and they had free access to water. They also had grazing and free access to shelter. She agreed they were skinny, but noted one was extremely elderly. She admitted he once said he'd like to just shoot the horses, but that was due to aggravation rather than cruelty.

Roth moved for a directed verdict, as there was no proof he'd acted wantonly or intentionally to harm the horses. The Court refused. Roth was convicted and appealed, and the Circuit Court upheld the conviction. He then appealed to the Court of appeals.

ISSUE: Is a person who does not own animals responsible for them?

HOLDING: No

DISCUSSION: The Court agreed there was not even a scintilla of evidence that Roth acted intentionally or wantonly toward the horses. In fact, he didn't even own the horses, as his ex-girlfriend owned two and Burke owned two, but since they were on his property, he made arrangements to care for them. He was reasonably relying on Burke, the owner of two them, to care for them, and he paid for food and care for all four of them.

The Court reversed his conviction.

NON-PENAL CODE OFFENSES

CONTROLLED SUBSTANCES

Com. v. Mefford, 2017 WL 4863183 (Ky. App. 2017)

FACTS: Mefford was arrested for DUI in Carroll County. He moved to suppress the results of the BA, which was denied. The Circuit Court, however, reversed the trial court's denial and the Commonwealth appealed.

ISSUE: Is it necessary to follow the manufacturer's instructions in an Intoxilyzer case?

HOLDING: Yes

DISCUSSION: Mefford argued that the trooper did not follow the manufacturer's instructions and did not observe him for 20 minutes prior to the test. The trooper testified that he followed the instructions provided to him by KSP – rather than the manufacturer's instructions which were posted next to the machine, on the wall. The question involved asking about the subject having brought anything up from the stomach to the mouth in the previous 20 minutes. A video recording indicated that Mefford had coughed within the time frame and "the sound of something coming up with the cough" could be heard. (He testified that he had been sick with a sinus infection.) The Court agreed that the trooper violated KRS 189A.103(4) by failing to follow the manufacturer's instructions.[4]

The Court upheld the suppression of the test results.

ARREST

Morrison v. Com., 2017 WL 5634900 (Ky. App. 2017)

FACTS: On February 10, 2016, the McCracken County Sheriff's Office executed a search warrant for a house and its residents. Morrison pulled up in his vehicle, observed by Det. Norman, and got out carrying a bag of a synthetic cannabinoid. Det. Norman proceeded to search Morrison, finding methamphetamine, and then using his keys, searched the truck, finding a gun, scales and other items. Morrison moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an improper arrest under state law compel suppression of the evidence?

HOLDING: No

DISCUSSION: All parties agreed that the initial charge, possession of synthetic marijuana, was a Class B. misdemeanor. Although the Commonwealth argued that an arrest was permitted under

[4] Com. v. Roberts, 122 S.W.3d 524 (Ky. 2003).

the circumstances, Morrison argued that KRS 431.015 required a citation instead. The Commonwealth conceded, but responded that the statute "does not establish a constitutional requirement which would compel suppression of evidence seized in this case." Since the arrest was premised on probable cause, the court agreed that violating the statute does not compel suppression of the items seized.

With respect to the search of the truck, the Court agreed that it could not be searched incident to the arrest. However, it could be searched pursuant to the "automobile exception."[5] Providing the officers had probable cause to believe the automobile contained evidence of criminal activities. However, the detective provided no information to connect Morrison with any criminal activity in the truck, and the court was unwilling to say that an individual's mere possession of a small quantity of a controlled substance was enough to support the search of their vehicle.

The Court agreed that although there were other possible ways to search the vehicle that it was not within their current power to review and that that it must affirm the trial court denial of the motion to suppress of Morrison's person, but reverse the denial of the motion with respect to the vehicle.

SEARCH & SEIZURE

SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION

James v. Com., 2017 WL 4464343 (Ky. App. 2017)

FACTS: Around April 6, 2017, Det. Jenkin, KSP, received reports of drug activity in Henderson. He and other officers went to do a knock and talk. They spotted James, who did not live there, walking in the area towards a nearby alley. He veered off as they approached. Det. Jenkin followed and spotted another man walking in the same direction as James, who turned out to be James' son. Jenkin identified himself as an officer but James ignored him.

Once troopers finally got him stop, they ordered James to show his hands. He kept his hands at his waistband and Jenkins saw items dropping to the ground from that area. He specifically noted a black canister. James was arrested. The canister, designed to hold diabetic test strips, contained a white residue and a glass pipe was also found. The pipe tested positive for methamphetamine, but the canister did not.

James claimed the canister but not the pipe. He was charged with possession of a controlled substances and related offenses, and appealed.

[5] Chavies v. Com., 354 S.W.3d 103 (Ky. 2011); Posey v. Com., 185 S.W.3d 170 (Ky. 2006).

ISSUE: Is physical proximity alone enough for constructive possession?

HOLDING: No

DISCUSION: The Court agreed that in this case, there was no evidence that the pipe was among the items Jenkin saw fall to the ground. The Court agreed that "physical proximity to an area where drugs are found is insufficient on its own to support a finding that an accused had constructively possessed those drugs."[6] Since there is no evidence James ever possessed it, he couldn't be convicted of tampering for dropping it.

The Court reversed his convictions.

SEARCH & SEIZURE – CONSENT

French v. Com., 2017 WL 5956683 (Ky. App. 2017)

FACTS: On December 22, 2014, French attempted to cheat on a required drug test as a condition of his probation, at the Nelson County Sheriff's Office. Kay, who was outside waiting for him, was approached by members of the Greater Hardin County Narcotics Task Force, who wwere investigated an unrelated crime. Since French's car was subject to search as a result of his probation status, a deputy used a drug dog on it, but no drugs were found. Since Kay's license did not have her current address, and she agreed she lived with French, she was questioned about the crime under investigation. She was taken, in custody, to that home. Officers searched the basement and then, upstairs, where they spotted a gun case and drug paraphernalia, a further search revealed guns, drugs and trafficking evidence.

French moved for suppression, arguing that Kay did not give consent to the searches. Deputy Hardin indicated that Kays only gave specific consent for the basement. Other officers indicated that they had obtained a key to search the upstairs and that he never heard Kays object in any way. (He also denied hearing officers tell her that they would "tear" the house up or that it would be better for her if she consented.) Another officer indicated that they had realized that the couple didn't actually live in the basement and that Kay agreed to the walk through. When they did that, however, they spotted illegal items in plain view. The audio recordings were turned on and off and at one point, Kay was refusing consent to the bedroom search and begging the officers not to tear up her mother's house. The recording also indicated the officers telling Kay that they would get a warrant for the entire house and would thoroughly search the entire house, not just the bedroom the couple occupied.

The trial court agreed it was not coercive and that the inevitable discovery doctrine also applied. French took a conditional plea and appealed.

ISSUE: Is passive acquiescence consent?

[6] Haney v. Com., 500 S.W.3d 833 (Ky. App. 2016).

HOLDING: No

DISCUSSION: The Court agreed that in this case "acquiescence is not consent."[7] The Court agreed that more was needed to determine if Kays did, in fact, consent to the walkthrough. The Court emphasized that consent must be voluntary, as well.

The Court also questioned the arrest of Kays, for her failure to change her address on her license. Although not before the court, it noted that "Kays's arrest for this minor offense raises the suspicion that the officers' purpose in arresting Kays was a pretext to obtain her consent to search the home she shared with French. What occurred after her arrest confirmed that suspicion."

There was also evidence that even if she did consent, she revoked that consent.

The Court noted:

> Instead of attempting to obtain a warrant, as stated by the trial court, the officers resorted to "bullying" tactics. Kays was threatened with harsher criminal consequences if she did not consent and told speaking to an attorney was futile. Most disturbing, despite that Kays repeatedly pleaded with the officers not to damage her mother's house, three officers threatened that the house would be "ripped apart," "look like someone had picked it up and shook it" and that the they would "destroy" her mother's house if she did not consent to a search of the bedroom.

The Court noted that "coercion is not a matter of degree. Either consent was obtained by coercion, in which case it was involuntary, or it was the product of the consenter's free will, in which case it was voluntary. As the United States Supreme Court has indicated, coercion and voluntariness of consent are incompatible. "Where there is coercion there cannot be consent."

In this case, the Court concluded, "the officers crossed the constitutional line between reasonable and unreasonable searches." But the Court then had to look at the inevitable discovery doctrine. The Commonwealth argued that "if Kays had not consented, a search warrant would have been obtained and the illegal items in the bedroom would have been inevitably discovered." Some federal case law indicates that the inevitable discovery doctrine does not apply merely because the police could have obtained a warrant. To do so would "completely obviate the warrant requirement of the [F]ourth [A]mendment."

In Com. v. Elliot, this Court held the inevitable discovery rule should not be applied to "'open the door'" to admitting evidence seized through an illegal search.[8] If probable cause to search alone was sufficient to excuse the warrant requirement, we would open the door so wide that the warrant requirement of the Fourth Amendment would become meaningless." As pointed out in the federal cases cited, if evidence seized in violation of the Fourth Amendment is admissible

[7] Bumper v. North Carolina, 391 U.S. 543 (1968).
[8] 714 S.W.2d 494 (Ky.App. 1986).

because probable cause existed for a warrant, there would be no need to get a warrant. To further add to the absurdity, officers would need a warrant only if there was no probable cause which, of course, they could not get. The Court agreed the Commonwealth's theory was "untenable."

In this case, even if the officers had probable cause to obtain a warrant, they did not do so. Instead, they decided to coerce Kays's consent. Under the circumstances, the inevitable discovery rule does not apply.

Based on the foregoing, the judgment of conviction is vacated and the case remanded for further proceedings.

SEARCH & SEIZURE – CELL PHONE

Franklin v. Com., 2017 WL 5031531 (Ky. 2017)

FACTS: On May 10, 2014, Franklin was at his grandfather's Jefferson County home. At some point, he spotted a man, and said ""that's the man I got to get." He walked out of sight and Jumper heard gunshots. According to Jumper, Franklin returned to the garage and gave Bald a gun, which Bald then took into his own home; Bald disputed this statement and states that Franklin · never gave him a gun. Bald's involvement was largely contested as his recorded interview was wholly inconsistent with his testimony at trial." Jumper left the scene.

Edelen heard the gunshots and found a man, Baker, lying near death from multiple gunshot wounds. Baker had been dating Franklin's cousin, Howard. Bald eventually took officers to the weapon, hidden in a neighbor's yard. Franklin was arrested several days later, and was in possession of a cell phone. The phone was seized and a warrant obtained.

Franklin was convicted and appealed. When his first appeal was unsuccessful, he appealed to the Kentucky Supreme Court.

ISSUE: Is a warrant preferred for cell phones?

HOLDING: Yes

DISCUSSION; With respect to the cell phone, Franklin argued that the search warrant affidavit was insufficient. The Court agreed that the "officer listed the facts of the case tying Franklin to the crime, connecting Franklin to the phone seized, and linking Franklin's use of the phone to his arrest and potential communications about the crime." In this case, the detective did just as the U.S. Supreme Court had dictated in Riley v. California, he obtained a warrant. Even if it was to be argued that the warrant was deficient, it would have been used in good faith.

The Court also addressed the use of Bald's recorded statement at trial. He had failed to respond to a subpoena and at trial, denied that he could remember anything whatsoever about the day. (He did, however, demonstrate a "brilliant memory" when questioned by the defense on cross, but lost it when questioned by the prosecution again.) The Court agreed that the Commonwealth followed the rules and gave Bald every opportunity to testify, but he refused.

The Court affirmed his conviction.

SEARCH & SEIZURE – TERRY FRISK

Brown v. Com., 2017 WL 6547065 (Ky. App. 2017)

FACTS: On September 25, 2015, Officer Bolton (Paducah PD) was dispatched to a man pointing a gun at passing vehicles. He found Brown, a few blocks from the incident, and Brown met the description, most particularly with respect to a particular team's logo sweatshirt. He could see a bulge in Brown's sweatshirt pocket. Officer Bolton approached and asked to frisk Brown, and was denied. They got into a tussle and eventually Brown was handcuffed. No firearm was found, but a phone, methamphetamine and marijuana were located.
Brown was charged with the drugs and moved to suppress. Denied, he took a conditional guilty plea and appealed.

ISSUE: Is it permitted to reach into a pocket during a Terry frisk?

HOLDING: No (as a rule)

DISCUSSION: The Court looked to Hampton v. Com. to determine if Bolton's actions were the "least intrusive means" available under the circumstances.[9] Specifically, the Court agreed that reaching into the pocket was not, and that he could have determined if the contents were a firearm by an outer frisk instead. Although detaining Brown was appropriate, once he was detained. "he did not have to reach into Brown's sweatshirt pocket to insure anyone's safety." As he never testified that he determined the items were contraband before bringing them into view, the seizure was not proper. As such, the search "impermissibly crossed the line from protective to investigatory."

The Court reversed the denial of the suppression motion.

Smith / Handley v. Com., 2017 WL 4570580 (Ky. App. 2017)

FACTS: On December 2, 2015, Det. Gibson (Pennyrile Narcotics Task Force) was contacted by a CI he'd worked with successfully before. She related a contact with a potential

[9] 231 S.W.3d 740 (Ky. 2007).

methamphetamine seller. The transaction was set up and Gibson kept apprised. Text messages were shared by the CI and a meeting was planned in Island.

Det. Gibson contacted Deputy Coomes (McLean County SO) about the buy, and he and Deputy Roush agreed to assist. Just before noon, the suspect vehicle arrived at the meeting place. The deputies confirmed it and Gibson asked them to "make contact" as he was on his way. The deputies did so, blocking in the vehicle, and they believed Handley, the driver was "preparing to flee or ram his cruiser." However, he and his passenger (Smith) complied when ordered out, and a third person, a woman, was also in the car. Scales were found during a frisk, Deputy Coomes thought it was a weapon. In frisking Smith, a "hard, round object" was found, which Deputy Gibson could not identify. It was discovered to be a pill bottle with methamphetamine.

The woman turned out to be Sara Willyard. She agreed to hand over her cellphone and gave the detective access, and she was the woman who had been in communication with the CI. Handley was discovered to have an arrest warrant. They did not check on Smith at that time, believing there was probable cause to arrest him anyway. (It was later believed he did have a warrant as well.)

More methamphetamine was found on both Smith and Handley during more detailed searches, and both were charged with trafficking and related offenses. They moved for suppression and both were denied, with the court finding the stop proper and the frisks, while improper, immaterial, because the evidence would have inevitably been discovered, at least on Handley, due to his warrant. Both took conditional guilty pleas and appealed.

ISSUE: May an item immediately recognized as contraband or a weapon be removed during a frisk?

HOLDING: Yes

DISCUSSION: Both men argued that their respective searches were improper, first because the traffic stop itself was improper and second, because the frisks were not lawful. The Court agreed that the initial stop was properly based upon a specific tip from the CI, which predicted when the suspect vehicle would be there.[10] (This set it apart from an anonymous tip.)

With respect to the frisks, contraband could be recovered it its incriminating nature is immediately apparently during the frisk.[11] The Court agreed that the frisk of Smith was improper, since the detective could not articulate what he thought was incriminating about the item, and as such, its removal was improper. In Handley's case, however, the Court agreed that the officer believed the scales might be a weapon. This situation resembles the case of U.S. v. Strahan, when the item was of the size, shape and feel of a possible weapon.[12] And nonetheless, he did have a

[10] Taylor v. Com., 987 S.W.2d 302 (Ky. 1998).
[11] Minnesota v. Dickerson, 508 U.S. 366 (1993).
[12] 984 F.2d 155 (6th Cir. 1993).

valid warrant and it would have been discovered anyway.[13] With that information, he would have been charged with drug trafficking, and a search of the interior compartment of the car would have been justified under Arizona v. Gant.[14] That in turn would have placed some of the evidence in the car, in the glove compartment, in Smith's reach, and that would have been cause for an arrest for constructive possession of that item.[15] Finally, Det. Gibson affirmed that had he not already believed he had enough to arrest Smith, he would have checked him for warrants, and this would have justified the arrest – which again would have led to a search incident to arrest. The Court affirmed both pleas.

SEARCH & SEIZURE – MOTEL ROOM

Castle v. Com., 2017 WL 5632309 (Ky. App. 2017)

FACTS: On June 21, 2015, Lexington Police and Fire were dispatched to an anonymous tip of methamphetamine manufacturing at a local motel. Fire arrived first and smelled what they thought was natural gas. Using a detector, they identified two possible room. One turned out to be a guest that had used air freshener. Although the case facts are not clear, apparently the police were on scene as well and had approached the second room and sought consent to enter, but had been denied by Castle. The firefighters entered the room, without force, and saw, in plain view, materials used in manufacturing. They backed out, as they were not trained to secure such labs, and related what they'd seen to the police who had arrived. Officers, in the meantime, had confirmed with a motel employee that the residents of that room were the suspects. At the same time firefighters entered, the manager gave Castle a notice to evict the room, which was noted to be of questionable legality since he'd apparently paid for a week. The manager had also given written consent to the police to search the room.

Castle was charged and sought suppression. Two separate hearing were held. At the second, the Commonwealth argued the search was valid on three grounds - the manager's consent, plain view and exigent circumstances. The trial court ruled that the exigent circumstances of a possible lab was sufficient to support the entry by the firefighters, and that plain view supported their relating what they'd seen and sharing with the police. (Further, the officer was justified under good faith in believing the manager could give consent.)

Castle took a conditional guilty plea and appealed.

ISSUE: Is a methamphetamine lab sufficient exigent circumstances to justify an entry?

HOLDING: Yes

[13] Carter v. Com., 449 S.W.3d 771 (Ky. App. 2014).
[14] 556 U.S. 332 (2009).
[15] Com. v. Mobley, 160 S.W. 3d 783 (Ky. 2005).

DISCUSSION: Castle argued that the firefighters did not have a valid reason to enter the property. The Court, however, agreed that in Pate v. Com., it had previously been held that a "methamphetamine lab can meet the exigent circumstance exception to the warrantless searches rule.[16] The Court agreed that the knowledge known to both police and firefighters, when combined, was sufficient to support entry under exigent circumstances.

The Court upheld Castle's plea.

Thomas v. Com., 2017 WL 4464332 (Ky. App. 2017)

FACTS: In May 2015, Det. Johnson (Lexington PD) spotted a particular vehicle stopped at a house, blocking traffic. He later learned the person who had gotten out of the vehicle had overdosed on heroin. The area was subject to complaints as a "drive-through for narcotics." The overdose victim claimed to have gotten the drugs from the driver of the vehicle. Det. Johnson identified Thomas as the owner of the vehicle. A few weeks later, on an unrelated call, he saw the vehicle again and determined that the license was expired. He made a traffic stop and spotted a shotgun in the back seat.

The detective called for a drug dog while another officer started writing a citation. During that time, the dog arrived and alerted. While the vehicle was being searched, Thomas apparently threw up a baggie contained narcotics, but it could not be retrieved. Thomas was arrested and gave consent for a search of his room, whether evidence was also found.

After that time, a CI made three controlled buys from Thomas. When arrested, he dropped a baggie and also had a large amount of cash on his person.

Thomas moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a long detention necessarily unlawful?

HOLDING: No

DISCUSSION: Thomas argued that the detention was prolonged, but the court agreed the dog arrived in a timely manner. There was no indication the process was extended to allow for the sniff, and was supported by the times indicated on the citation. The Court also agreed that the arrest was properly supported by the controlled buys.

Thomas's conviction was affirmed.

[16] 243 S.W.3d 327 (Ky. 2007).

SEARCH & SEIZURE – TRAFFIC STOP

Redfern v. Com., 2017 WL 5632308 (Ky. App. 2017)

FACTS: On March 20, 2014, Redfern was stopped at a DUI checkpoint conducted by KSP. He was arrested. The court reviewed the checkpoint, and noted that the site was preapproved by KSP, and the officers present had flashing lights and safety vests. They had also issued a press release and there was "minimal intrusiveness to the stops." The Court upheld the stop and the DUI, and Redfern appealed.

ISSUE: Is signage of a roadblock required by Buchanon?

HOLDING: No

DISCUSSION: The Court reviewed the provisions in Com. v. Buchanon.[17] The Court agreed that although KSP had not erected signs, they did, however, inform the public by press release and the checkpoint was well illuminated. Although signage was noted in Buchanon, it was not required, as the list of factors in that case was no exhaustive or rote. [18]

The Court upheld the ruling.

Dudley v. Com., 2017 WL 5632308(Ky. App. 2017)

FACTS: In September, 2004, Covington police received several anonymous tips about the driver of a specific vehicle, being involved on drug trafficking. Sgt. Holstein located the vehicle and began surveillance. Other officers assisted and made a traffic stop for an unsignaled turn. Sgt. Ernst, with his K9, Orry, in a marked car, made the stop. He made a high risk stop and identified the driver as Dudley. The passenger was released.

Orry alerted on the vehicle. Dudley refused consent to search the car and was allowed to leave, but the vehicle was impounded pending a search warrant. Cocaine and a gun were found in the vehicle, with other items.

Dudley was ultimately indicted for possession of the gun (he was a felon) and of the cocaine. Ultimately he was found guilty of the gun charge, and took a conditional guilty plea to the possession of a controlled substance charge. He then appealed.

ISSUE: Is a dog sniff done during the time frame of an ordinary traffic stop lawful?

HOLDING: Yes

[17] 122 S.W.3d 565 (Ky. 2004)

[18] See Com. v. Cox. 491 S.W.3d 167 (Ky. 2015).

DISCUSSION: Dudley argued the traffic stop was unreasonable as it was based on an anonymous tip. The Court agreed it was based on a valid traffic offense, and since Orry was already present at the stop, there was no "undue delay" in allowing the dog sniff, while they were still making the ordinary inquiries incident to the traffic stop. Very early on in the process, they had probable cause for the search, with that alert.

The Court also addressed the lengthy delay between his indictment and his trial, ten years. The primary reason for the delay, however, was his incarceration in Ohio for an unrelated matter. Although Kentucky failed to put a detainer on him, which would have returned him for trial, he was still responsible for the delay. Once he asserted speedy trial rights, he was accorded them but in the meantime, much of the evidence had disappeared, including the vehicle and the witness, as well as records on the K-9.

The Court agreed the stop was proper, but that the Commonwealth's negligence in the delay was enough to entitle him to a dismissal of his charges.

Hodges v. Com., 2017 WL 5632314 (Ky. App. 2017)

FACTS: On the day in question, Officer Barnett (Louisville Metro PD) pulled over a white Impala with dark windows and a police spotlight mounted, in response to a BOLO. The BOLO came as a result of a 911 caller who gave information of the vehicle and provided his contact information. The vehicle was suspected of involvement in a violent home invasion in which a person was shot. The officers were working an unrelated traffic crash when the vehicle drove up. Barnett followed the vehicle and pulled it over a block away. Given the nature of the BOLO, the officer performed a "felony stop." Hodges got out and Barnett approached, he smelled marijuana and saw bullets on the passenger side floorboard.

Det. Mount was working the shooting and responded to the scene. He spoke with Hodges, who was wearing a red shirt, as indicated by the shooting victim. Hodges, Malone and Click were ultimately charged in the robbery.

Ultimately, he was charged with possession of a firearm. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May an officer rely on a BOLO to make a stop?

HOLDING: Yes

DISCUSSION: Hodges argued that the BOLO was insufficient to support the stop. The Court agreed that "a police officer may rely on a 'BOLO' to justify stopping an individual if certain conditions are met."

Further:

> "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, . . . to pose questions to the person, or to detain the person briefly while attempting to obtain further information."[19] "It is the objective reading of the flyer or bulletin that determines whether other police officers can defensibly act in reliance on it."

Hodges argued that the caller was anonymous and did not actually witness the crime, but only provided information about a suspect vehicle. The Court, however, noted that "an anonymous and uncorroborated tip may, under certain circumstances, justify a brief investigatory stop."[20] In this case, the caller made the call "almost contemporaneously with the alleged home invasion and shooting. Although he was coherent, the caller was highly agitated and acting under the stress of a shocking event, which the Navarette Court characterized as an indicator of reliability, likening it to the hearsay exceptions for "present sense impression[s]" and "excited utterances." Although the caller did not actually witness the shooting, he heard the shots and was asked by the victim himself to contact the police. He did not give his name (and the operator did not request it), but he did provide a phone number. Although he did not observe anyone in the white Impala commit the crime, he did describe the car scoping around the area and then vanishing immediately after the shooting. His description of the vehicle was very detailed, providing its year, make, model, color and distinctive characteristics of the police-type spotlight and tinted windows. Additionally, the caller reported an incident that was undeniably of a very serious criminal nature. The Court agreed that was sufficient reasonable suspicion.

The Court upheld his conviction.

INTERROGATION

Com. v. Young, 2017 WL 5632715 (Ky. App. 2017)

FACTS: On September 28, 2013, Johnson was fatally shot in Jefferson County. The next day, Sgt. Lesher (Louisville Metro PD) interrogated Young. At the time, Young was on home incarceration for an unrelated offense. He was taken to the PD and made several admissions about the firearm used in the shooting. Ultimately he, and three others, were arrested in the homicide and robbery.

Young moved for suppression, arguing he did not voluntarily waive his Miranda rights. He had been given the warnings, and signed a form acknowledging that waiver. During the relevant interchange, Sgt. Lesher denied that he would be "outed" to his fellow defendants, who he was being asked to implicate. Ultimately, he did admit to helping one of his codefendants to hide the

[19] U.S. v. Hensley, 469 U.S. 221 (1985).

[20] Navarette v. California, 134 S. Ct. 1683 (2014)

firearms used in the shooting. The trial court agreed to the motion to suppress and the Commonwealth appealed.

ISSUE: Is a false assurance of confidentiality permitted?

HOLDING: No

DISCUSSION: The Court agreed that "although police routinely use deception in interrogations, they are not permitted to engage in trickery in such a way as to vitiate Miranda." The trial court had ruled that although Young was properly advised of Miranda, that it was undercut but the interrogator stating "he would not 'tell on' Young." Although the Commonwealth claimed that Lesher's assurances were only with respect to the violations of home incarceration he was admitting, the assurances were specifically connected to the guns used in the homicide. This amounted to, the court agreed, a "false assurance of confidentiality to gain incriminating statements."

The Court affirmed the motion to suppress.

Townsend v. Com., 2017 WL 4712450 (Ky. App. 2017)

FACTS: In October 2014, Detective Thompson (KSP) accompanied a social worker to Townsend's home, in Estill County, to investigate sexual abuse allegations made by Townsend's daughter. (The relationship is not clear, however.) Townsend was asked if he would meet the officers at the Irving PD answer questions. He arrived, with his sister, who waited while Townsend went to the interview room. Although they had to "buzz in" to gain admittance to the interview area, there were marked exits visible, however.

They detective closed the room door, but told Townsend he did not have to talk and that he could stop at any time, and seek to speak to an attorney. Other officers were nearby and could be heard in the hallway. An officer came in to talk to the detective at one point, on an unrelated matter. Townsend confessed and was allowed to leave.

Townsend was arrested two months later on sexual abuse charges. He moved to suppress his statements, and was denied. He took a conditional Alford[21] plea and appealed.

ISSUE: Is Miranda required if the subject is not in custody?

HOLDING: No

DISCUSSION: Townsend argued his statement should be suppressed because he was not "afforded full Miranda[22] warnings." The Commonwealth agreed he did not get full Miranda

[21] North Carolina v. Alford, 400 U.S. 25 (1970).
[22] 384 U.S. 436 (1966).

warnings, but that he was not in custody, either. It looked to Cecil v. Com.[23] and agreed that Townsend voluntarily appeared for questioning, he knew he could leave at any time, only one officer interviewed him, he was not in restraints and he was permitted to leave afterward. Although Townsend argued his interviewer was armed, the Court noted that all officers are armed and that issue was simply immaterial. Other officers in the area were also immaterial. Although the officer did not expressly tell Townsend he could leave, it did not change the analysis that he was not in custody.

The Court agreed his confession was voluntary and upheld his plea.

Quarles v. Com., 2017 WL 6379446 (Ky. 2017)

FACTS: Quarles and Ivory were gambling at a house party on November 22, 2014, in Hopkinsville. They got into several arguments and Quarles retrieved a firearm. Williams tried to intervene and begged Quarles not to shoot Ivory. Ivory left and Quarles following, triggering another altercation, and Quarles shot Ivory in the face, fatally.

Quarles was arrested and given Miranda, and subjected to a lengthy questioning. He did not request an attorney until asked about a polygraph or GSR test. Officers obtained a search warrant for the latter. During that test, he admitted to owning a cell phone that had been seized, and provided the passcode. He was indicated for murder. Electronic data extracted from his phone was introduced at trial that showed he tried to search how to remove gunshot residue from his hands, after the shooting.

Quarles was convicted and appealed.

ISSUE: Is a conditional request for an attorney enough to suppress the statement?

HOLDING: No

DISCUSSION: Quarles tried to suppress all statements arguing he had invoked his right to counsel at the police station. The Court agreed that he asked for an attorney conditionally – to be present during a polygraph – and that the officers respected that. He also made the request prior to the GSR test, but in that case, they did continue to ask questions about his phone, "stating that they would inevitably find the information through forensic means" even if he did not cooperate. The Court agreed that was improper, but that the error was harmless.

The Court upheld his conviction.

SUSPECT IDENTIFICATION

Jeter v. Com., 531 S.W.3d 488 (Ky. 2017)

[23] 97 S.W.3d 12 (Ky. 2009).

FACTS: In January, 2015 Perry was robbed in the parking lot of the Towne Mall in Elizabethtown. After a lengthy struggle with the victim inside the car, the robber fled. He was also seen by another witness. Perry was transported for medical care and gave a description of her attacker, and the other witness did as well. Because the witnesses could not be sure about an identification, no attempt was made to present Jeter, when arrested, to either of them. Jeter was arrested as a result of security video, which showed the truck he'd been driving, and which led back to his mother. Glasses were found in Perry's car which matched those Jeter had been seen wearing shortly before the robbery. With a search warrant for his home and truck, more evidence was found. He was linked to Perry's truck with DNA.

Jeter offered an alibi / mistaken-identity defense, claiming to have been at a crack house at the time of the robbery. The third-party witness, Albrecht, however, identified him at trial as the man she'd seen.

Jeter was convicted and appealed.

ISSUE: Is eyewitness testimony admissible?

HOLDING: Yes

DISCUSION: Jeter argued that the identification was improperly admitted under Neil v. Biggers.[24] The Court agreed that all eyewitness testimony had a degree of suggestiveness, and that due process concerns only exist when officers used a process that is "both suggestive and unnecessary." The trial court had rejected the Biggers argument, but offered Jeter a chance to argue it in a suppression motion. However, at trial, Albrecht specifically pointed out Jeter in court.

The Court upheld the identification and the conviction.

Garrett v. Com., 534 S.W.3d 217 (Ky. 2017)

FACTS: During his trial for murder and robbery in Jefferson County, a witness identified Garrett from the witness stand. He had been unable, however, to select his photo from an array shown several days after the crime. He was convicted and appealed.

ISSUE: May a witness who did not make an identification from an array still make an identification from the witness stand?

HOLDING: Yes

[24] 409 U.S. 188 (1972),

DISCUSSION: The Court agreed that the witness was properly allowed to make the identification in trial, pursuant to the recently decided Fairley·v. Com.[25] He was properly given the opportunity to cross-examine the witness.

In another note, the Court addressed a colloquy between the detective and Garrett's counsel. He was challenged on a delay in including certain information in the report, and the detective defended his actions, noting that he did his job as diligently and honestly as he could. Garrett's counsel argued that was "improper self-bolstering." The Court agreed, however that his credibility had been attacked, "insinuating that he was lying and committing perjury." As such, he was permitted to defense himself under Tackett v. Com.[26]

The Court upheld his convictions.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – CONFIDENTIAL INFORMANT

Shanklin v. Com., 2017 WL 4712519 (Ky. App. 2017)

FACTS: On September 3, 2013, Shanklin was under observation by officers. He entered a vehicle with a tag that did not match the vehicle. They approached him when he was stopped at a gas station and he became agitated, but provided ID. He was placed in handcuffs and held pending the arrival of a drug dog, which eventually alerted and marijuana was found. At the same time, detectives approached the house where he'd been and smelled marijuana from outside. They obtained a search warrant for the house and found marijuana plants and a handgun.

Shanklin, a convicted felon, was charged with possession of the gun and the plants. He moved to suppress, arguing the stop was improper. The Circuit Court denied the motion and he was convicted. He then appealed.

ISSUE: May the identity of a CI be suppressed?

HOLDING: Yes

DISCUSSION: Shanklin argued that the marijuana odor was discovered while he was being detained at an arguably illegal stop and thus the warrant was not supported by an independent basis. The Court agreed the warrant was separate and apart from the stop, and issued as a result of information from a CI (that triggered the initial surveillance) and was thus proper.

[25] 527 S.W.3d 792 (Ky. 2017)
[26] 445 S.W.3d *20,* 32 (Ky. 2014).

The Court also agreed that it was proper to deny the identity of the CI under KRE 508(a). Shanklin argued that the informant might be a perpetrator or co-conspirator in the cultivation, but he never claimed anyone else lived in the house. As such, the information was not shown to be able to provide relevant testimony about another person. As such, the informant was "just a tipster" who claimed to have seen the plants. The Court agreed it was proper to withhold the information.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Richmond v. Com., 534 S.W.3d 228 (KY. 2017)

FACTS: In 2014, Richmond and Valladares (her boyfriend) were arrested for assault and abuse of Valladeres's daughter, N.V. The child was autistic. Valladeres had removed his daughter from school after questions arose about marks on her body. The child was punished repeatedly for soiling herself and her bed, and was forced to ingest her urine or feces when she had an accident. She was subjected to repeated cold showers and starved. (Richmond's son also lived with them, but was subjected to no punishment.) Valladeres took a plea and testified against Richmond, shifting much of the blame for the abuse to her.

Richmond had brought the child to the hospital, where she was found to have pressure sores and be malnourished, but claimed no knowledge initially of the abuse. She then admitted she knew Valladeres was punishing her repeatedly.

During the trial, N.V.'s foster mother testified, over objections, about the child's fear of having bowel movements and of the shower and how excited she was about eating.

Richmond was convicted of criminal abuse and assault, and appealed.'

ISSUE: May a lay witness testify about common behaviors?

HOLDING: Yes

DISCUSSION: The court agreed to that the testimony was permitted victim background evidence, and was properly provided by the witness. The witness was also properly allowed to testify as to common behaviors by autistic children, as a lay witness, as she was not admittedly an expert.

The Court upheld the conviction.

Tatum v. Com., 2017 WL 6381720 (Ky. 2017)

FACTS: During his trial for reckless homicide, a copy of his current arrest photo was shown briefly to the jury, with the stated intent to show a lack of defensive wounds and his demeanor. The photo showed a t-shirt depicting two assault rifles. He was convicted and appealed.

ISSUE: May a current booking photo be shown at trial?

HOLDING: Yes (under specific circumstances)

DISCUSSION: The Court agreed "mug shots are generally not admissible at trial because of their apparent implication that the defendant previously engaged in criminal conduct.[27] A defendant's current arrest photo, on the other hand, implies nothing about the defendant's criminal history, therefore, the prior-bad-act concerns are not implicated. Such photos may be admitted, if: (1) the prosecution has a demonstrable need for the evidence; (2) the photo, either as taken or as edited, does not imply that the defendant had a criminal record; and (3) the photo is introduced in a manner that does not draw attention to its source or implications."

The Court, however, noted that the reasoning for using the shot was invalid, however, since Tatum never claimed any physical altercation and there was numerous witnesses that could testify about his demeanor. The court agreed the introduction of the photo was error, but harmless. Further, the Court agreed introduction of a printout as to a marksmanship course but no indication that Tatum actually attended, further, the shooting was a matter of spraying, rather than aimed fired. The Court agreed it too was error, but harmless, as was a target that was also located.

Despite this, the Court agreed, since he never denied firing the shots at the house that resulted in his victim's death. However, the Court agreed it was proper to introduce evidence of a bag of "gun accessories" as relevant to the crime, as that indicated some degree of preparation for the crime.

The Court also agreed that it was proper to exclude evidence of Tatum's mental health issues (autism and a hoarding disorder) as relevant to his defense of extreme emotional disturbance. The later "must be supported by 'some definite, non-speculative evidence'."[28] Statements he made to a mental health professional after the fact would have been "self-serving statements to aid in his defense."

The Court upheld the Reckless Homicide conviction, but did dismiss other charges for unrelated reasons.
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TRIAL PROCEDURE / EVIDENCE – EVIDENCE

[27] *See* *Redd v. Com.* , 591 S.W.2d 704 (Ky. App. 1979) (citing *Roberts v. Com.* , 350 S.W.2d 626 (Ky. 1961)).
[28] *Padgett v. Com.* , 312 S.W.3d 336 (Ky. 2010) (citing *Holland v. Com.*, 114 S.W.3d 792 (Ky. 2003))."

Terry v. Com, 2017 WL 6061823 (Ky. 2017)

FACTS: Terry was charged with a home invasion/assault in Jefferson County in 2015. The crime had occurred in 2011. A few months after his arraignment, the investigator submitted additional discovery materials to the prosecutor that had originated in 2012 but not been included in the case file. The material included a potentially inculpatory statement in an investigative letter. Although he had not been given Miranda at that time, the officer indicated he was not asking for any response, but simply informing him of why he was obtained a buccal swab pursuant to a search warrant.

Terry was convicted of Assault and Burglary, and appealed.

ISSUE: Are statements made during a collection of evidence custodial interrogation?

HOLDING: No

DISCUSSION: The court agreed that the statement was not made during a custodial interrogation and as such Miranda was not required. He was, in fact, the one asking questions of the officer. Although the delay was of concern, under RCr 7.24(11), the trial was rescheduled for several months later so there was no prejudice in it.

After discussing several other procedural issues, the Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – ADOPTIVE ADMISSION

Moss v. Com., 531 S.W.3d 479 (Ky. 2017)

FACTS: Thompson and Sanders were visiting the Simpson County home of Moss and Layle. Moss called 911 and reported that he had been attacked in his home and has shot the individual (Thompson). Deputy Jones (Simpson County) arrived and found Thompson laying on the porch, down across the steps, with Sanders crying over him.

He took Layle, Moss and Sanders inside and tried to calm the chaotic scene by talking to them. Moss was trying to explain when Sanders screamed that he'd shot Thompson in the back for no reason. Moss "made no reply; he remained seated with his hands partially covering his face and mouth." Sanders was separated and send to sit in a patrol car. Moss went with the deputies to make a more formal statement, voluntarily. He was indicted for murder.

At trial, the jury convicted him of Manslaughter 2d, on a theory of "imperfect self-defense." He appealed, and the Kentucky Court of Appeals agreed that Moss's failure to respond to Sanders' accusatory statement was admissible under KRE 801A(b)(2) as an adoptive admission (an admission by silence.) Moss further appealed.

ISSUE: Are adoptive admissions (by silence) admissible?

HOLDING: Yes

DISCUSSION: The court reviewed the circumstances of the statement. Moss argued that his initial description of what had happened was flawed because he was in shock and Sanders was screaming.

The Court reviewed the background of the rule.

> KRE 80 lA(b) governs· the hearsay rule exception pertaining to admissions of parties .. Even though Sanders' accusation might otherwise be inadmissible hearsay, KRE 801A(b)(2) would permit its introduction into evidence *if,* under the circumstances, Appellant's conduct including his failure to reply "manifested [his] adoption or belief in its truth."3 KRE. 801A(b)(2) is the modern expression of a well-established common law rule of evidence:

When accusatory or incriminating statements are made in the presence and hearing and with the understanding of the accused person and concerning a matter within his knowledge, under such circumstances as would seem to call for his denial and none is made, those statements, and the fact that they were not contradicted, denied, or objected to, become competent evidence against the defendant.[29]

Like many common law rules of evidence that have been included in modern codes of evidence, KRE 801A(b)(2) derives its wisdom from an elementary rule of human nature that was long ago woven into the fabric of the common law. Griffith explains the rational basis for the rule:

> Admissibility of [an out-of-court accusatory statement] as not being tainted by the hearsay stigma is based upon the crystalization [sic] of the experience of men that it is contrary to their nature and habits· to permit statements to, be made in their hearing and presence tending to connect them with an offense for which they may be made to suffer punishment without entering an objection or denial unless they are in some manner repressed or restrained or there is seemingly no natural and proper call for such contradictions. The occurrence is a fact for the jury to 'interpret as throwing light upon the question of guilt or innocence. Its probative force may be great or little according to the particular, circumstances and the general mental and moral fiber of the person charged. Such is the rationale and the rule in this state.[30]

Most recently, the Court had looked to Cunningham v. Com., in which it had noted "that "[t]o qualify as an adoptive admission through silence under KRE 801A(b)(2}, the defendant's silence must be a response to 'statements [of another person, the declarant] that would normally evoke denial by the party if untrue.[31] A trial court has broad discretion in determining the facts

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[29] Griffith v. Com. , 63 S.W.2d 594 (Ky. l933).

[30] 63 S. W.2d at 596.

[31] 501 S.W.3d 414, 419 (Ky. 2016) (citing Trigg v. Com., 460 S.W.3d 322 (Ky. 2015), quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook§* 8.20[3][b] at 597 (5th ed. 2013)).

regarding the admission of evidence under KRE 801A(b)(2) and we review its determination in that regard for abuse of discretion.[32] Nevertheless, when reviewing an application of KRE 801A(b)(2}, we remain mindful of Professor Lawson's warning that "[s]ilence with respect to a statement will always have some ambiguity, which creates a need for cautious use of the concept and thoughtful consideration of the circumstances surrounding that silence."[33]

The Court noted that in fact, Moss was not "silent" as he was already talking to the deputy when Sanders interjected.

> He would have "had no "natural and proper call" to contradict Sanders' outburst when he was then and there in the process of telling his side of the story to the police, especially after his explanation had provoked Sanders' accusation. Engaging Sanders in a debate about the shooting would not be a reasonable option under such circumstances and would not have been helpful to police trying to quiet a chaotic situation. Given those circumstances, it cannot reasonably·or fairly be said that Moss was naturally called to contradict Sanders' accusation, and it appears that the trial court did not take this factor into account. Moss's failure to verbally protest Sanders' accusation did not "manifest an adoption or belief in its truth." KRE 801A(b)(2). We are satisfied that admitting Sanders' accusation under such circumstances was an abuse of discretion, and therefore the corresponding inference that Moss had tacitly adopted her accusation as his own truthful statement was improperly.-allowed.

However, Moss never denied he shot Thompson, but claimed self-defense. Since the jury clearly was not swayed by Sanders' accusation, apparently believing instead that he did fire in mistaken self-defense, the court found the introduction harmless.

The Court also discussed testimony by Det. Thompson, who described the inconsistencies between Moss's statements at the scene and in interview. The Court agreed that was not an improper comment on his "pre-arrest exercise of his right to remain silent." Such "inconsistent statements are properly introduced as substantive evidence."[34]

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – EXPERT

Weiss v. Com., 2017 WL 5034472 (Ky. 2017)

FACTS: Weiss was charged with the shooting death of Tanner, in St. Matthews. With little evidence, the case went cold, although Weiss remained a suspect. Finally, three witnesses,

[32] Dant v. Com., 258 S.W.3d 12(Ky. 2008) (citation
[33] Trigg, 460 S.W.3d at 332 (quoting Lawson, *The ·Kentucky Evidence Law Handbook§* 8.20[3][b] at 597).
[34] Jett v.Com. , 436 S.W.2d 788 (Ky. 1969);.KRE 801A(b)(l).

including Weiss's wife, came forward with information that Weiss had confessed to shooting Tanner over a drug debt. Weiss was convicted of murder and appealed.

ISSUE: Must an individual meet criteria to be qualified as an expert?

HOLDING: Yes

DISCUSSION: During the trial, Davis testified that his stolen Glock was possibly the murder weapon. It had been traced, after being stolen, to Weiss, and the murder weapon was never found. The Glock had been loaded, when stolen, with the same ammunition used in the murder. Although Davis had two test caseings, that had been included when he bought the weapon, they did not match. However, Fite, another witness, who testified as an expert, mentioned that "Glock manufacturers are notorious for not properly matching the test-fired casings with the correct gun." Davis had also testified that the ammunition he had loaded into the gun was unusual, if not rare.

The Court looked at both testimony with respect to KRE 701.

> This rule limits opinion testimony by a lay witness to that which is, *inter alia,* "[r]ationally based on the perception of the witness ... [and] [n]ot based on scientific, technical, or other specialized knowledge within the scope of Rule [KRE] 702." This is not to say that lay witnesses can never provide testimony on a subject that is technical in nature, so long as their opinions are based on sufficient life experiences.[35] In the case before us, Davis had corresponding life experience buying and utilizing ·ammunition. His testimony indicated. that he was a firearms instructor who had purchased guns· and ammunition since his. teenage years. Furthermore, his testimony was focused entirely on his personal experience buying.ammunition for his own gun.[36] Accordingly, we cannot find that the trial court abused its discretion, as Davis' testimony was not based on scientific, technical, or specialized knowledge, rather his own personal experiences.

The Court also agreed that it was relevant and probative information for the jury.

With respect to Fite's statement, the Court agreed that it was inadmissible hearsay. In fact, Fite did not testify, but submitted his information through a report which was properly introduced. Det. Napier testified that Fite had expressed concerns about the test-fired casings, and that was improper. The Commonwealth conceded that "allowing Detective Napier to recount the off-the-record conversation violated Appellant's right to confrontation under the Sixth Amendment to the United States Constitution and Section 11 of of Kentucky Constitution.[37]

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[35] Mondie v. Com., 158 S.W.3d 203, 212 (Ky. 2005) ("The degree to which a witness may give an opinion, of course, is predicated in part upon whether and the extent to which the witness has sufficient life experiences that would permit making a judgment as to the matter involved.").
[36] See Hunt v. Com., 304 S.W.3d 15 (Ky. 2009).
[37] See Crawford v. Washington, 541 U.S. 36 (2004).

However, the Court agreed that there was substantial proof of his guilt and the error was harmless.

The Court also looked to the admission of testimony of Det. Ball, who expressed inadmissible opinion testimony (as to Weiss's status as the only suspect) and hearsay. The Court agreed it was proper law testimony under KRE 701, however, as he explained that he simply never had another suspect developed, and helped explain the scope of his testimony. But the Court continued, it did find it inadmissible hearsay as he was, in effect, making the statement to "prove the truth of the matter asserted."

The Court noted that:

> Whether Officer Ball's testimony summarizing his interviews violated Weiss's confrontation rights turns on three questions: (1) Were the. out-of-court statements testimonial? (2) Were the declarants unavailable to testify? (3) Did Appellant have an opportunity to cross-examine the declarants?[38]
>
> As to the first question, we can easily conclude that the out-of-court statements were testimonial. They were given to Detective Ball during the course of an investigation regarding past events relevant to a subsequent criminal prosecution. However, Weiss's constitutional claim fails the second and third questions, as twenty police interviewees testified during Weiss's trial. Indeed, the interviewees who Detective Ball referred to in his hearsay conclusion, testified during the trial and were subject to vigorous cross-examination. Thusly, we cannot opine that Weiss's right to confront those witnesses was violated.[39]

Detective Hung also read from a transcript in which another detective interviewed Weiss, in which the other detective suggested he was led to Weiss by God. Although the statements might have been meaningless, they weren't improper, as the statements were connected to chance discoveries of valuable evidence. The Court also ruled that several instances of prior bad act evidence under 404(b) was improper, but not so prejudicial as to warrant a mistrial. The Court also agreed that his wife's testimony against him was proper, since she was part of the crime, having been charged with helping him discard the evidence.

Hardy v. Com., 2017 WL 6379445 (Ky. 2017)

FACTS: On November 21, 2014, Hardy spent most of the day drinking at a friend's house. She drove him back to his car, where it was parked at a store, on the promise that he would be getting a ride from that location rather than driving. Unfortunately, he did choose to drive and

[38] Dickerson, 485 S.W.3d at 327.

[39] *See* Dickerson, 485 S.W.3d 310 (holding that defendant's confrontation rights were not violated ·when detective summarized witness interviews because four of the interviewees testified and were subject to cross-examination at trial).

ultimately struck Pryor's car in the rear, killing him. He had been observed speeding and driving erratically, with his emergency flashers blinking, before the crash. His BA at the time was .190, and was combined with Seroquel.

Hardy was charged with wanton murder, DUI and related charges. A reconstruction indicated he was doing 90 mph, in a 30 mph zone just before the crash, nor did he brake prior to the crash. He was convicted and appealed.

ISSUE: Is it proper to admit a statement that indicates a perpetrator has no remorse for a crime?

HOLDING: Yes

DISCUSSION: Hardy had tried, unsuccessfully, to have the victim's toxicology report entered, which would have showed a low level of drugs and THC in his system. The Court agreed it was irrelevant as there was no evidence he was driving improperly or did anything that contributed to the crash. The Court agreed that its introduction would only serve to confuse the jury, and it was properly excluded.

Further, the court allowed it was proper to admit a post-collision statement that served to refute his remorseful testimony at trial, when he was informed that Pryor was dead. The Court agreed that it was admissible.

CIVIL LITIGATION

EMPLOYMENT

Redmon v. City of Paducah, 2017 WL 6547390 (Ky. App. 2017)

FACTS: Redmon, a Paducah police officer, was terminated for assaulting a prisoner. Following an investigation, the Chief filed formal charges pursuant to KRS 15.520 and 95.450. At a subsequent hearing, he was found to have violated three specific PPD policies. The prisoner refused to testify as he had pending criminal charges, and an audio interview that had been recorded earlier was shown to the hearing board. Redmon argued that he was not given the opportunity to cross-examine the individual as a result. The hearing board upheld the termination.

Redmon appealed to the McCracken Circuit Court, on both that issue and an unrelated conflict of interest issue. The Court awarded Summary judgement to the city and Redmon appealed.

ISSUE: Are due process rights violated under KRS 15.520 when cross examination is not allowed of a charging witness?

HOLDING: No

DISCUSSION: Redmon argued that his Due Process rights were violated when he was not allowed to cross-examine Cerullo before the Board. (He was called, but asserted his Fifth Amendment rights.) The Court upheld the ruling.

MISCELLANEOUS

McCaleb v. Com., 2017 WL 5045608**Ky. App. 2017**

FACTS: McCaleb worked as a DirecTV installer in Campbell County and stole underwear from his customers' homes. He also friended them on Facebook and used that information to burglarize their homes. He admitted to a fetish for underclothing and had thousands of photos of underwear on his devices. He was indicted with burglary and theft.

He moved to suppress the evidence recovered at two Ohio addresses, and was denied. He pled guilty. Two years later he demanded the return of a number of items, and the commonwealth responded by requested forfeiture on some of the items. All that remained at issue were computers and hard drives containing photographs of the stolen items. The Commonwealth had offered to clear the drives and return them, but argued he should not be allowed the photos. The trial court agreed and McCaleb appealed.

ISSUE: May a suspect retain photos of contraband for which they'd been charged?

HOLDING: No

DISCUSSION: The Court agreed that allowing him to keep the photos would further victimize the victims, and he would be allowed to enjoy the fruits of his crimes. The garments were highly personal items and simply converting them to a digital image did not change the nature of the items.

The Court upheld the denial of the return of the photos.

SIXTH CIRCUIT

FEDERAL LAW

U.S. v. Allen, 2017 WL 5045608 (6th Cir. 2017)

FACTS: On September 16, 2015, Alvaraez died of a drug overdose in Lexington. She was in possession of a syringe with morphine, and a spoon with heroin and fentanyl. She died from an "acute combined drug" poisoning, fentanyl, heroin and gabapentin, but had a number of other drugs in her system as well. Her boyfriend was in possession of her phone and got texts that he believed were from another drug dealer, and contacted the Lexington PD. He worked with them to try to make a buy from who turned out to be Allen.

Allen was arrested the next day, when he arrived to make the sale. He had three small baggies, mostly of heroin, with one mixed with fentanyl. Allen was charged with distributing drugs that resulted in a death. He argued that with the cocktail of drugs in her system, that the government did not establish he was responsible for all of the drugs. He was convicted and appealed.

ISSUE: Can a drug dealer be charged with a fatality when they provide the drugs?

HOLDING: Yes

DISCUSSION: The Court looked to Burrage v. U.S., and agreed there are two ways to make the federal case, to "provide drugs that are either an independent, sufficient cause of the victim's death or a but-for cause." The ME had testified that the fentanyl level alone was lethal, and that she died shortly after taking it, since it was in her blood but not her urine. The Court agreed that was sufficient under Burrage to justify the conviction.

The Court also looked to the court allowed Det. Graul (Lexington PD) to interpret language in the text messages that were received. The Court agreed that the messages, however, needed no interpretation and that a lay person could have easily understood what was being communicated. However, the court found the error to be harmless for the same reason.

Allen's conviction was affirmed.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Rodriguez, 2017 WL 5195412 (6th Cir. 2017)

FACTS: Rodriguez was arrested as the result of evidence found in two different search warrants, one in 2009 and one in 2011. He argued there was an "insufficient nexus between evidence of drug trafficking" and his home, and that the information was stale. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does the passage of time necessarily make information stale?

HOLDING: No

DISCUSSION: The Court agreed that the two warrants both justified the searches, and that the second while based upon much of the same information as the first included additional information about new sales that had just occurred days before. The Court agreed that the passage of time was not significant when the "crime is ongoing or continuous and the place to be searched is a secure operational base for the crime." The court upheld his plea.

U.S. v. Sweeney, 2017 WL 4403322 (6th Cir. 2017)

FACTS: In 2011, Sweeney began a sexual conversation with a 13 year old girl. The girl's mother discovered the messages and involved the police. The girl stated she'd met him once but did not sent him nude photos which he requested. Det. Davis, Fort Oglethorpe PD, initiated an arrest warrant for state crimes. She involved the police department where Sweeney lived and a detective there referred to Davis's incident report, but misstated that the child did send nude photos. When it was executed, they found a sawed-off shotgun, which was illegal for Sweeney (a felon) to possess, and it was seized.

He was charged under federal child exploitation and gun crimes, and moved to suppress due to the error in the warrant. He was denied, convicted and appealed.

ISSUE: Is an error in a warrant necessarily material?

HOLDING: No

DISCUSSION: The Court ruled that the error was not a material omission and not enough to trigger a Franks hearing, and that stripped of the comment, there was still sufficient information to support the warrant.

Also, he argued that the Georgia arrest warrant was flawed, but the Court agreed that under a federal claim, it was a valid arrest based on probable cause, irrespective of the validity of the actual arrest warrant.[40]

The Court affirmed his conviction.

U.S. v. White, 874 F.3d 490 (Ky. 2017)

FACTS: In October 2013, Investigator Williams (unnamed Tennessee agency) received a tip from a CI that White was selling marijuana at a specific home. The CI was enlisted to make a

[40] U.S. v. Fachini, 466 F.2d 53 (6th Cir. 1972); Criss v. City of Kent, 867 F.2d 259 (6th Cir. 1988).

buy, and met him sitting in a truck at the home. White left and the CI met with Williams, who then prepared an affidavit for a search warrant for the house.
The warrant read:

> *Investigator Brandon Williams received information that marijuana was being sold from 196 Turner Lane in Covington, TN 38019 in Tipton County, TN by a black male identified as Albert Dajuan White. Investigator Brandon Williams initiated a controlled purchase of marijuana with the use of a confidential source from the residence. Investigator Brandon Williams placed audio and video on the confidential source. The confidential source then proceeded to 196 Turner Lane in Covington, TN[,] Tipton County, TN. Investigator Brandon Williams observed the confidential source pull into the driveway of 196 Turner Lane in Covington, TN 38019 in Tipton County, TN and pull up next to a white Chevrolet truck where Albert White gave the confidential source the marijuana for the previously recorded drug fund money. Investigator Brandon Williams then observed the white Chevrolet truck leave the residence with Albert White driving the vehicle. The confidential source then left the residence and met with Investigators where the marijuana was recovered. The transaction was captured on an audio and video device. This incident occurred in Tipton County, TN. in the last seventy-two hours. A sudden and forceful entry is clearly necessary for the safety of Deputies, residents, or other nearby persons or property due to Albert Dajuan White's extensive criminal history consisting of Evading Arrest, Resisting arrest, and numerous possessions of SCH II and VI. Albert is also known to have dogs believed to [be] pit bulls at his residence. During the subsequent search, marijuana, a gun and cash was found, including cash linked to the buy.*

White was indicted on federal weapon and drug charges. He moved to suppress, arguing there was insufficient proof that the contraband would have been found there. Specifically, he noted that "No reasonable officer would have believed otherwise, defendant also contended, because "the affidavit is so facially defective given that no time or date is stated as to when the alleged criminal activity took place." His motion was suppressed, with the magistrate judge finding that the warrant was sufficient, or at the least, that the good-faith exception would apply.

White was convicted and appealed.

ISSUE: Is a minimal affidavit necessarily "bare bones?"

HOLDING: No

DISCUSSION: Since the prosecution based its defense in the motion on the good-faith exception, the Court assumed, without deciding, that the affidavit failed to establish probable cause. It looked to the good-faith exception to the exclusionary rule, as developed by U.S. v. Leon.[41]

[41] 468 U.S. 897 (1984).

Leon "outlined for circumstances in which an officer's reliance would not be objectively reasonable." In this case, the issue was whether the "affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Such an affidavit is called a "bare bones" affidavit, a "conclusory affidavit."

Further:

> A bare-bones affidavit should not be confused with one that lacks probable cause. An affidavit cannot be labeled "bare bones" simply because it lacks the requisite facts and inferences to sustain the magistrate's probable-cause finding; rather, it must be *so* lacking in indicia of probable cause that, despite a judicial officer having issued a warrant, *no* reasonable officer would rely on it.[42] The distinction is not merely semantical. There must be daylight between the "bare-bones" and "substantial basis" standards if Leon's good-faith exception is to strike the desired balance between safeguarding Fourth Amendment rights and facilitating the criminal justice system's truth-seeking function.[43] Only when law enforcement officials operate in "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" will the "heavy toll" of suppression "pay its way."[44] Otherwise, "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful," excluding evidence recovered as a result of a technically deficient affidavit serves no useful purpose under the exclusionary rule. We must therefore find that the defects in an affidavit are apparent in the eyes of a reasonable official before faulting an executive official for complying with his or her duty to execute a court-issued order.[45]

In this case, the tip provides some connection between the crime and the residence, giving a precise address, providing at least a minimal nexus. The detective did some corroboration by checking the subject's background, and provides sufficient practical content. He witnessed White sell drugs on the property, albeit in the driveway. It was nothing like the prototypical bare bones affidavits, as discussed in "Nathanson v. United States[46] and Aguilar v. Texas.[47] The inferences that may not be enough for probable cause may "suffice to save the ensuing search as objectively reasonable. Although there was no drug deal observed inside, the courted looked "not to what the affidavit could have said, but rather what it did say and ask whether a reasonable officer would have relied" on it.

The Court affirmed the denial of the motion to suppress.

U.S. v. Hunt, 2017 WL 6016389 (6th Cir. 2017)

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[42] U.S. v. Helton, 314 F.3d 812 (6th Cir. 2003).
[43] *See* Leon, supra; Carpenter, 360 F.3d at 595.
[44] Davis v. U.S., 564 U.S. 229, 237–38 (2011) (quoting Herring v. U.S., 555 U.S. 135, 144 (2009), and Leon, 468 U.S. at 908 n.6).
[45] Leon, 468 U.S. at 921 ("[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." (quoting Stone v. Powell, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring))).
[46] 290 U.S. 41 (1933),
[47] 378 U.S. 108 (1964)

FACTS: On September 2, 2015, a Michigan law enforcement team obtained a search warrant for detailed cell phone records for a particular phone, supported by information from Cis and drug buys. The subscriber was not to leave Michigan, pursuant to parole conditions, but was discovered with that data to be in the Chicago area. It was tracked back into Michigan and eventually stopped for a minor traffic offense. A K9 was already en route and when it arrived, the trooper who made the stop turned off his camera to prevent information being shared about the CI. He neglected to restart the camera for some 20 minutes. The driver (Hunt's daughter, although he was in the car) refused consent. The K) alerted and Hunt admitted there was both heroin and cocaine in the car

The other occupants were released. Hunt moved to suppress the evidence and was denied. He took a conditional guilty plea to trafficking and appealed.

ISSUE: Is discovering the driver is not authorized on a rental agreement enough to prolong a traffic stop?

HOLDING: Yes

DISCUSSION; The Court agreed that the search warrant was sufficient, and that the CI was reasonable reliable. The stop was also proper, especially given that the vehicle was a rental and none of the occupants were apparently listed as authorized drivers. The GPS information indicated that Hunt, who was in the car, had left the state, as well. The lack of a recording, Hunt argued, negated his ability to challenge the dog's alert. The court found it "concerning but not fatal to the search." Hunt had the opportunity to fully question the handler about the dog, and that was sufficient.

Finally, the court agreed that his inculpatory statements, made, he argued, to protect his family, were still validly offered.

The court upheld his plea.

SEARCH & SEIZURE – EXIGENT ENTRY

U.S. v. Felix, 2017 WL 4403320 (6th Cir. 2017)

FACTS: In February 2013, Oklahoma law enforcement stopped a truck destined for Lexington, loaded with 93 kilos of cocaine. The driver agreed to cooperate and the cocaine was substituted with a sham product. The product was exchanged for 1.8 million in cash, in sealed bags. The police followed the driver as he drove into an enclosed garage, and entered the house, but he was nowhere to be found. They began canvassing and found a man meeting the description walking through a closed shopping plaza, who was underdressed for the weather. An officer stopped and spoke to him, and he gave an answer that raised more suspicion as the officer

knew his comment to be untrue. Other officers confirmed he was the man they'd spotted earlier and another confirming that Felix had accepted the drugs.

Felix was indicted on drug trafficking charges. He moved to suppress and was denied. He took an unconditional plea and then appealed.

ISSUE: May an exigent entry be based on a belief that occupants inside a house have been alerted?

HOLDING: Yes

DISCUSSION: Despite the fact he took an unconditional plea, the Court addressed the suppression issue. The Court agreed that their entry into the house was appropriately based on exigent circumstances, to prevent evidence from being lost or destroyed.[48] They had arrested an individual they'd believed to be a lookout in the process and were concerned that others, inside, had been alerted. The use of his race as a description was also proper, as certainly if the person they were looking for was Hispanic, appearance and race should certainly be considered. Other factors led the officer to interact with Felix as well, his dress and the location.

The Court upheld his plea.

SEARCH & SEIZURE – WIRETAP

U.S. v. Orozco (and others), 2017 WL 5479598 (6th Cir. 2017)

FACTS: In September, 2015, the DEA, as part of a larger investigation, used a wiretap authorization to capture phone calls between Pedraza and a Mexican citizens. They arranged a meeting which was observed by agents, and when they stopped the vehicle, driven by Solis, they found over $300,000 in cash. Another traffic stop, also learned of through the wiretap, netted 28 kilos of cocaine. Eventually, multiple subjects, including Orozco and Pedraza, were apprehended and charged. Pedraza was convicted, and appealed.

ISSUE: Must a wiretap be truly "necessary" to be valid?

HOLDING: No

DISCUSSION: Among other issues, Pedraza claimed that the wiretap was unlawfully obtained, in that it did not meet the "necessity" requirement. "Under 18 U.S.C. § 2518(1)(c), each application for a wiretap "shall" include, among other things, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[48] U.S. v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988).

The Court, however, agreed that nothing indicated that the application was insufficient when it was made, even though some other techniques had been successful in uncovering certain information.

The Court upheld the conviction.

42 U.S.C. §1983

42 U.S.C. §1983 – SEARCH & SEIZURE

Sanders v. Oakland County, MI, 705 Fed.Appx. 452 (Mem) (6th Cir. 2017)

FACTS: In 2012, Dep. Ferguson (Oakland County, MI, SO) was investigation "Flip" – believed to be Sanders – for drug dealing. Twice he was subjected to search, the first as part of a traffic stop and the second for a search warrant. Ultimately, he was arrested. However, while the case was pending, Ferguson was fired for lying on a search warrant, and all charges were dropped against all pending suspects, including Sanders.

Sanders filed suit under 42 U.S.C. 1983, alleged violations of Fourth Amendment. The trial Court found for Ferguson and the Sheriff's Office, and Sanders appealed.

ISSUE: Is predictive information sufficient for a traffic stop?

HOLDING: Yes

DISCUSSION: Sanders argued that there was insufficient reasonable suspicion to make the first traffic stop in which he was searched. The court agreed that predictive information, that was corroborated, provided by the CI, was sufficient for that stop. With respect to the search warrant, the court agreed that the information Ferguson had, and documented, as to buys, was also supported by other evidence, and was enough to support the search warrant affidavit.

The Court affirmed the trial court's decision dismissing the case.

42 U.S.C. §1983 – FALSE ARREST

Zavatson v. City of Warren, 2017 WL 4924673 (6th Cir. 2017)

FACTS: On November 27, 2012, Sonnefeld, a high school staff member, discovered that over $500 was missing from his office safe. He went to the financial office to obtain replacement cash, needed for a school sporting event that night, and that employee also discovered cash missing. Warren PD officers responded. Eventually, Detective Seidl, who had been a detective

for a month and received two weeks of on the job training, on top of his police academy, was assigned.

At the same time, Skop, who headed security for the school, reviewed security video. He saw an unidentified man enter Sonnenfeld's office the week before. During the same time frame, Zavatson could be seen entering and leaving the custodian break room. Sonnefeld told another detective, Dahlin, that he thought the thief had committed the crime during the Thanksgiving break and had keys. He specifically suspected Zavatson. Seidl was given a flash drive with the video footage and the principal drew his attention to the unidentified man. The two custodians, Zavatson and McConnell were both accounted for during that time, but it was noted that there may be a way to leave the custodian's office and go to Sonnefeld's office, without being seen by the cameras. Seidl learned that the custodians has master keys. Zavatson denied having taken the money. Seidl compared the height of the mysterious subject with Zavatson and believed it to be a match. He documented the scene of both crimes with photographs and applied for an arrest warrant. In the summary of offense section, he wrote:

> On 11-20-12 at 2227 hrs Zavatson, while working at 23200 Ryan he stole money from the Athletic Department's safe located in the Athletic Director's Office. Daniel used keys and safe combo to steal $510 from the safe. Daniel further stole an additional $250 from the business office safe. That safe was located in a storage room next to the office. The keys to the safe and cash box were hidden in two different filing cabinets in his office. The theft from the Athletic Director's Office was caught o[n] video and Daniel is the only custodian matching the physical description of the suspect and is assigned to that area.

A prosecutor reviewed the documents and signed off on the warrant. She later noted, however, that she would have liked to have known there was video showing Zavatson in another area of the school at the same time. At the same time, the school investigation ruled the situation inconclusive and Zavatson was told to return to work, but called in sick because he was told to also report to the police. He was suspended eventually for failure to report he'd been charged with a felony, a violation of state law. After a grievance, he was terminated.

During pretrial proceedings, the court upheld the first charge, but dismissed the second count because there was a wide window of opportunity for the second crime to have occurred. Finally, on March 6, 2013, Seidl had fingerprinting done of the safes, Zavatson's were not found. Zavatson also successfully, voluntarily, passed a polygraph. Ultimately, the Court quashed all charges against him.

Zavatson filed suit in U.S. District Court, but the court ruled in favor of the defendants. Zavatson appealed.

ISSUE: Will deliberate omissions and false statements doom an arrest?

HOLDING: Yes

DISCUSSION: The Court first looked at the false arrest claim, and found that the school defendants had no liability at all. With respect to Seidl, however, the Court agreed that there was insufficient probable cause to arrest Zavatson and that at most, Zavatson's guilt was speculative. Although he had access to a key, there was no information as to how many others did as well. With respect to being able to leave the custodial break room unseen and go to the office, the Court noted that they were at opposite ends of the building and likely unable to traverse in three minutes, as would have been required.
With respect to whether a reasonable officer would have made the omissions claimed by Seidl, the court found numerous deliberate false statements and intentional omissions. The Court agreed that summary judgement at this stage was not warranted.

The Court did, however dismiss the claims of failure to train and supervising, finding that although the short training provided to Seidl might have been deficient, they were not deliberately indifferent.

The Court allowed the false arrest claim to move forward but affirmed the remaining decisions.

B.R. v. McGivern, 2017 WL 4978681 (6th Cir. 2017)

FACTS: Three preteen girls accused a female schoolmate, B.R., age 10, of sexually assaulting them during sleepovers. The father of one of the girls reported the alleged sexual assaults to the Canfield Police Department. He met with officers to explain the allegations, including Det. McGivern. The detective arranged for the Children Services to interview the accusers about the allegations. He also received information from the school principal about their interactions at school.

During the interviews, the girls gave detailed information about their claims. All of the observers found the girls to be credible. B.R. was then interviewed, and she denied all of the sexual claims, instead stating that she was being bullied by her accusers. Ultimately, B.R. was charged. A month later, her father requested the police initiate an assault investigation against his daughter at a sleepover. Further interviews suggested the four girls were all experimenting sexually, but one insisted that B.R. had raped her and threatened her if she told.

When the accusers began recanting their claims, the juvenile court found reasonable doubt and quashed the charges against B.R. She (through her parents) filed suit against the involved officers and the City of Canfield, for false arrest and related claims. The District Court found for the defendants and B.R. appealed.

ISSUE: Is a mistake in an investigation necessarily actionable?

HOLDING: No

DISCUSSION: The Court agreed that the police had probable cause to believe, at least initially, that B.R. committed rape. Experienced investigators all found the girls to be credible. B.R.

claimed that Canfield was liable because they "regularly assigned police officers to investigate juvenile sexual misconduct without proper training."

The Court affirmed the dismissal of the action.

42 U.S.C. §1983 - USE OF FORCE

Thomas v. City of Eastpointe / Barr, 2017 WL 4461072 (6th Cir. 2017)

FACTS: On the day in question, Thomas and Clements spent a pleasant day with their girlfriends. That night things "took a turn for the worse," and Clements stormed out. He returned in moments, just as his girlfriend tore off her shirt. He "mistook her rage for infidelity" and the argument "spilled outside." Several 911 calls were made about a "crazy fight" in the middle of the street. Officers Barr and Menzer rolled up "with their dash cams rolling and spotlights illuminated." Clements and Thomas were yelling at each other and did not comply with orders to get on the ground. The two officers split up, with each approaching one of the combatants. Barr approached Thomas and since he could not see his hands, tased him without warning. He was immediately handcuffed. He complained of plain and was taken to the hospital, where he was found to have a fractured elbow.

Thomas filed suit, claiming excessive force. Barr claimed qualified immunity which was denied. He appealed.

ISSUE:

HOLDING:

DISCUSSION: The Court began: "The camera may not lie, but it does not always tell the whole story." The Court needed to consider "only the facts that were knowable to Officer Barr at the time of the incident."

The Court noted that this case did "not fit cleanly into either camp" = that of active or passive resistance with respect to Taser use. The Court agreed that Barr's commands were clearly audible, although Thomas claimed he did not hear them. He was not aggressive toward the officer, but he did appear to ignore commands and moved away from the officers, and legally constituted flight. Nothing legally required Barr to warn Thomas before using the Taser. The Court agreed that the law is "not clearly established that an officer cannot tase a suspect who refuses to comply with a police officer's commands and walks away.'" The Court agreed Officer Barr was entitled to qualified immunity on the claim.

With respect to the handcuffing claim, however, there were disputes of facts on precisely what happened, and whether Barr ignored complaints of injury, that prevented summary judgement.

Smith v. City of Troy, Ohio, 874 F.3d 938 (6th Circ. 2017)

FACTS: On February 11, 2014, Smith suffered an epileptic seizure while driving in Troy. He steered into a yard got out of his car and walked away. A citizen called 911 and Deputy Ostin (Miami County) arrived. The deputy saw Smith sweating and his pants down, revealing his underwear. Osting believed Smith was under the influence. He pried his fingers from a fence he was clutching and they struggled until Officer Gates arrived, followed by two more officers. Smith was tased multiple times. Smith later stated he "drifted in and out of lucidity during the incident." He remembered telling Osting he was sick and seizing, but did not remember the struggle. He finally awoke in an ambulance.

Smith filed suit against all involved, claiming an ADA issue. The trial court found their response to be "measured force," and not excessive force and granted summary judgement. Smith appealed.

ISSUE: Is using force against an unresisting subject allowed?

HOLDING: No

DISCUSSION: The Court agreed that nothing indicated that Smith had "committed any crime, even a minor one." The deputy agreed Smith said he was sick and needed a restroom, and that he presented no safety threat. He was never placed under arrest. Osting's use of a leg sweep to put Smith on the ground, and then landing on top of him, was clearly too much. Although Smith did not comply with commands, when not under arrest, did not justify handcuffing. As such, Osting was not entitled to summary judgement on this issue.

The Court agreed that Gates was justified in using his Taser, however, because he would have been unaware of what had transpired, but would have only seen someone resisting being handcuffed. However, multiple tasings were improper as Smith would not have had enough time to comply with commands in between the tasings. As such, Gates was not entitled to summary judgement on this issue.

The other two officers, however, were properly granted summary judgement, as was the municipal entities involved.

The Court agreed that there was no ADA issue, however.

Latits v. Phillips, 878 F.3d 541 (6th Cir. 2017)

FACTS: On June 24, 2010, shortly after midnight. Officer Jaklic (Ferndale, MI PD) stopped Lattis for a traffic offense. When Latits opened his glovebox, the officer spotted what he believed was marijuana and a pill bottle, which Latits then tried to move under the seat. His dash came showed that the officer drew his firearm seconds after he walked up to the car and at one point, pointed it at Latits' head. Latits drove away with Jacklic in pursuit. He followed him into a parking

lot and although the officer claimed that Latits tried to ram his patrol vehicle, the video indicated that Latits steered away from the car instead. (Another officer was entering the lot at that time as well.) Latits left the lot at this point, three officers were behind him, Wurm, Jaklic and Phillips. (Phillips was violating policy at that point, as it was prohibited for more than two vehicles to pursue without specific authorization.) Officers continued to chase him and Wurm hit Latits' car, twice, and radioed that fact. That caused Latits to lose control and he swerved out. Phillips sped past the other officers and rammed Latits' car, sending it into a spin. The officers surrounded him and Latits and Jacklic ended up in a "very low-speed head-on collision" as Latits tried to drive off again. Phillips chased the car on foot and fired on Latits as he moved in reverse, and would have known that there was no one in the path behind Latits. He was shot three times, from the front.

Phillips, who violated numerous policies in the process was fired. Latits' estate representative filed suit under 42 U.S.C. §1983, claiming excessive force. The trial court gave Phillips summary judgement, finding the use of force objectively reasonable. Latits appealed.

ISSUE: Will an officer only be judged on what the law was at the time?

HOLDING: Yes

DISCUSSION: The Court began by noting "the events of this case were recorded by video cameras mounted on the dashboards of four separate police cars. Consequently, we describe the facts "in the light depicted by the videotape."[49] It agreed that the "The reasonableness inquiry is an objective one, considered from the perspective of a hypothetical reasonable officer in the defendant's position and with his knowledge at the time, but without regard to the actual defendant's subjective intent when taking his actions.

The Court must avoid "the 20/20 vision of hindsight," recognizing that officers in tense and evolving situations may have to make a split-second decision about the amount of force that is necessary. The reasonableness analysis thus includes some "built-in measure of deference to the officer's on-the-spot judgment."[50] At the same time, the "fact that a situation unfolds quickly does not, by itself, permit officers to use deadly force. Rather, qualified immunity is available only where officers make split-second decisions in the face of serious physical threats to themselves and others."[51]

As a general rule, the Fourth Amendment prohibits the use of deadly force to prevent the escape of fleeing suspects unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[52] Of the three non-exclusive

[49] Scott v. Harris, 550 U.S. 372 (2007).
[50] Mullins v. Cyranek, 805 F.3d 760 (6th Cir. 2015) (citations omitted).
[51] Graham v.Connor, 490 U.S. 386 (1989).
[52] Tennessee v. Garner, 471 U.S. 1 (1985).

factors listed in Graham, "the threat factor is 'a *minimum* requirement for the use of deadly force.'" [53]

In cases of vehicular flight, the Court looked to Cass v. City of Dayton.[54]

> The "critical question" is whether the officer had objective "'reason to believe that the [fleeing] car presents an imminent danger' to 'officers and members of the public in the area.'"[55] Deadly force is justified against "a driver who objectively appears ready to drive into an officer or bystander with his car," but generally not "once the car moves away, leaving the officer and bystanders in a position of safety," unless "the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car." The Sixth Circuit has found deadly force justified by prior interactions demonstrating continuing dangerousness only when the "suspect demonstrated multiple times that he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around."[56]

In this case, Phillips fired after the side of the car had passed him, and when he was clearly not in any immediate danger. Further, he could clearly tell no one else was at risk either.

Applying Graham:

> Officer Phillips knew from Officer Jaklic's broadcast that Latits was originally suspected of possessing narcotics—not a violent crime. The second Graham factor asks if the individual poses an immediate threat to the safety of an officer or others. The videos show that Officer Phillips first observed Latits's car as it was turning to avoid Officer Jaklic's car; the district court determined that Phillips could see that Latits did not try to ram Jaklic's car. Latits then fled at no more than sixty miles per hour down an almost entirely empty ten-lane divided highway at night. In his pursuit of Latits, Phillips passed only one parked car, and no other pedestrians, cyclists, or non-police cars are visible on Phillips's dashboard camera for the remainder of the chase. The videos make clear that Phillips observed Latits drive partially over a grassy median, attempting a U-turn, and then saw Officer Wurm's car hit Latits's car twice, and that Latits did not ram Officer Wurm. Phillips then observed Latits swerve across the empty highway, which was bordered by a cemetery and largely vacant state fair grounds. As Officer Phillips sped past the two officers preceding him in the pursuit (in violation of department policy), he could observe that Latits was able to straighten his car for about five seconds before Phillips rammed him off the road (also in violation of department policy and a direct order). Up to the point when Latits's

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[53] Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005)); see also Ciminillo v. Streicher, 434 F.3d 461 (6th Cir. 2006) (stating that a person has a "right not to be shot unless they are perceived as posing a threat to officers or others").
[54] 770 F.3d 368, 375 (6th Cir. 2014).
[55] Id.(quoting Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)).
[56] Cupp, 430 F.3d at 775 (characterizing the suspects in both Scott v. Clay Cty., 205 F.3d 867, 872 (6th Cir. 2000), and Smith v. Freland, 954 F.2d 343 (6th Cir. 1992)).

> car came to a stop after Officer Phillips rammed it off the road, Latits had shown no intent to injure the officers. Though Latits did briefly lose control and swerve after Wurm hit him twice (for which Officer Wurm was disciplined for violating department policy), there were no members of the public nearby to be endangered and Latits appeared to regain control of his car before Officer Phillips rammed him.

Finally, after Latits's car had come to a stop off the road, Officer Phillips observed Latits slowly drive forward and collide with the front of Officer Jaklic's car. However, the video permits the reasonable interpretation that this collision was accidental, in which case it would provide less justification for deadly force.[57]

Moving forward through the gap between the cars of Phillips and Wurm, Latits was not facing head-on with Officer Jaklic's car until one to two seconds before their impact, likely too late for either car to avoid the low-speed collision. Viewing the video in the light most favorable to the Plaintiff, the slow collision reveals intent to flee, not intent to injure officers. Whether a fleeing suspect showed objective intent to injure officers is relevant to whether the suspect presented sufficient danger to justify deadly force.[58] The videos additionally reveal that Latits did not commit felonious assault, which is also relevant to the Graham factor addressing the severity of the crime.[59]

The danger to the public was relatively low, given the overall circumstances, and occurred on an "effectively empty highway." Accepting that it must look at the situation from Phillips' perspective, it noted that Phillips wasn't even struck by Latits.

> In sum, considering the totality of the circumstances in the light depicted by the video and otherwise most favorable to the Plaintiff, we conclude that Latits did not present an imminent or ongoing danger and therefore that the shooting was not objectively reasonable. In addition, although police procedures do not set the bounds of the Fourth Amendment, we consider it relevant that Officer Phillips repeatedly violated police procedures in both ramming Latits and running up to his car.[60]
>
> For these reasons, we conclude that Officer Phillips's use of deadly force was objectively unreasonable and in violation of Latits's constitutional rights.

However, the Court agreed, "At the time of the actions of Officer Phillips, however, it cannot be said that existing precedent made it clear to reasonable officials that what Phillips did violated

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[57] *See* Sigley, 437 F.3d at 536; Vaughan v. Cox, 343 F.3d 1323, 1330 (11th Cir. 2003) (holding that a collision with a police car that could be viewed by a jury as accidental did not automatically justify deadly force); *cf.* Godawa, 798 F.3d at 463 (finding that deadly force was unreasonable because a jury could determine that the officer initiated the impact with the driver's car rather than the driver intentionally targeting the officer).
[58] *See* Sigley, 437 F.3d at 536 (reversing a grant of summary judgment where it was not clear whether the suspect "intended to injure" others).
[59] *See* Godawa, 798 F.3d at 466 (reversing the district court for not viewing the evidence in the light most favorable to the Plaintiff when considering which crimes the fleeing driver had committed).
[60] *See* Mullins, 805 F.3d at 768 ("Whether or not an officer is following police procedures is certainly relevant to the question of reasonableness in excessive force cases, but it is not necessarily conclusive proof that the Constitution has been violated.").

the Fourth Amendment. Thus, this case fails to satisfy the "clearly established" prong of the qualified immunity doctrine. As such, the court agreed he was entitled to qualified immunity.

INTERROGATION

Curry v. Klee, 2017 WL 6492848 (6th Cir. 2017)

FACTS: Curry shot Jackson at the Michigan home of a mutual friend, Ray. Curry was arrested that same day, following a police chase during which he suffered scratches and bruises. He claimed police refused to take him to the hospital. Det Ruth interviewed Curry during which time Curry claimed, essentially, that he'd shot Jackson in self-defense. He asked again about going to the hospital for treatment and was told that would happened when they "got done here." He waived Miranda and described the shooting. He was then taken for an examination and found to have no serious injuries.

Follwing charges, he moved to suppress the statement, arguing it was involuntary since they had refused to take him to the hospital first. The motion was denied, and he was convicted of murder and related offenses. He appealed, and the state courts found his confession voluntarily. He took a habeas petition and was denied at the District Court level. He then appealed.

ISSUE: If a person chooses to talk after people warned, is the statement voluntary?

HOLDING: Yes

DISCUSSION: The Court quickly agreed that he had been told he could stop talking whenever he chose and that he had no serious injuries needing treatment. As such, the Court found that did not render his confession involuntary. Further, despite his claim that he was drunk, high and sleep-deprived at the time, that he was alert and responsive during the interview. The Court discounted this claim as well.

Finally, he argued that he was not given Miranda until after the interrogation had begun, and the Court agreed, but also ruled that the post-warning statements were admissible. Since they were essentially cumulative with the pre-warning statements, the Court found that the admission of those statements was harmless.

U.S. v. Woodley, 2017 WL 5033707 (6th Cir. 2017)

FACTS: On January 12, 2015, Woodley was arrested for a federal carjacking offense, having been indicted several days before. He was transported to the station and given Miranda warnings, which he signed. He was not informed, however, that he had already been indicted for the crime. He was questioned for several hours and subsequently confessed. He was questioned the next day, after receiving and waiving Miranda again.

Following his arraignment, he moved to suppress the statements as well as cell phone tracking information. That was denied, and he was convicted. Woodley then appealed.

ISSUE: Will the warnings provided in Miranda suffice for postindicement questioning?

HOLDING: Yes

DISCUSSION: The Court noted that when he was indicted, his Sixth Amendment right to counsel attached. The court in Patterson v. Illinois had agreed that providing Miranda was sufficient.[61] Woodley argued, however, that his lack of awareness of his federal indictment changed the evaluation. The court noted, however, in this case, that the only true statement he made that implicated himself occurred after he was informed of the indictment. The Court agreed that "whatever warnings suffice for Miranda's purposes will also be sufficient in the context of postindictment questioning."

The Court upheld his conviction.

Perreault v. Smith, 874 F.3d 516 (6th Cir. 2017) (CERT REQ)

FACTS: During his interrogation for the murder of his infant daughter, the examining officer told him his story was inconsistent. Perreault replied "Well, then let's call the lawyer then 'cause I gave what I could." The officer agreed. Perreault said there was no reason to take him to jail, and the officer explained that getting a lawyer was not going to prevent that. Perreault continued to talk to the officer. The Michigan appellate courts found that not to be an unambiguous invocation but instead "akin to negotiations."

Perreault was convicted and appealed. He then took a federal habeas petition.

ISSUE: If a subject continues to talk after asking for a lawyer, is that voluntary?

HOLDING: Yes

DISCUSSION: The Court agreed that the state court's interpretation was reasonable and that the request was not unequivocal.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – CELL PHONE DATA

U.S. v. Pembrook (and others), 876 F.3d 812 (6th Cir. 2017)

[61] 487 U.S. 285 (1988)

FACTS: While investigating two robberies, 150 miles apart between Michigan and Pennsyvlvania, FBI Agent Max did a tower dump of the towers closest to each crime scene. He placed a particular pre-paid phone at each site in the relevant time frame. He then tracked the phone number around the area. He connected that number to three other numbers, with which it was in constant communication. Ultimately, he linked one of the phones to Calhoun through the rental of a car, arranged through that number. In one of the robberies, a vehicle like the one rented was seen on surveillance video. Security video at a hotel linked the rental vehicle with a minivan seen at both robberies as well. Further investigation put names to the other phones. Ultimately, one of the witnesses picked out two of the phone users (Calhoun and Briley) in a photo array. Pembrook was linked by DNA, having been shot by a victim at one of the scenes. Numerous charges were placed against the suspects. At trial, Agent Hess testified as an expert on cell-tower site investigations and Agent Max as a lay witness. They were convicted and appealed.

ISSUE: Is obtaining cell site data a "search?"

HOLDING: No

DISCUSSION: Calfhoun and Briely argued they were entitled to suppression of the photo array because the witness was not certain, and her memory was tainted by watching the surveillance videos later. (She admitted she'd seen it, although the investigator denied he had shown it to her, but it was locked up and she shouldn't have had access to it. He indicated she'd seen it prior to his first interview with her.) The Court denied their arguments.

With respect to the suppression of the cell-tower location evidence, the court noted that the evidence was obtained under the Stored Communications Act, 18 U.S.C. §2701, which reads:

> A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) . . . when the governmental entity . . . obtains a court order for such disclosure under subsection (d) of this section[.]

The standard under the SCA requires on "reasonable grounds" – which is less than probable cause. At the time (and now), there is no authorities that established that "obtaining cell-site data—even data that might reveal [the defendants'] daily travel over a six-week period or disclose [their] presence in a private place—was a search within the meaning of the Fourth Amendment." The Court agreed the request was proper and supported.

The Court also agreed that allowing the two agents to testify as to their knowledge was also proper, and that cell-site analysis is reliable. The Court agreed that the evidence was proper and did not require a Daubert hearing to be valid. Max's testimony was related solely to his personal knowledge and was also admissible.

The Court upheld the convictions.

TRIAL PROCEDURE / EVIDENCE –TESTIMONY

U.S. v. Whittle, 2017 WL 5041085 (6th Cir. 2017)

FACTS: Whittle was identified as being involved in a number of armed robberies in Louisville. He was arrested on November 8, 2012, and interrogated by several detectives. Two formally interrogated him and he engaged the other two, who were supervising him, in various questions. He expressed concern about being a snitch, and one of the detectives told him that another one of the suspects was already 'down the hall telling the whole story to the police." He expressed remorse that someone was hurt and was encouraged to confess, and eventually did so. .His confession was repeated on a recording.

Whittle was indicted on a number of robberies, and convicted of several of them, as well as firearms offenses. Whittle appealed.

ISSUE: Is it hearsay if testimony is not introduced to prove the truth of the matter asserted?

HOLDING: No

DISCUSSION: Whittle first made several hearsay objections to testimony in his trial. Specificlaly, a detective was asked why the police searched the house of another individual, if Whittle was the target, and the detective replied that they had information from that subject that Whittle sometimes stayed there. The Court agreed that was not offered to prove the truth of the matter asserted, that Whittle did stay there, but only to explain why they thought they could find evidence there.

The Court also agreed that it was proper for a Detective to testify that discussions with other suspects linked Whittle to a round found in his home to a weapon he was found to have used in one of the robberies, which the court found was not hearsay. The Court also agreed that playing the full confession recording, over Whittle's objection, was necessary to portray the circumstances accurately. (Whittle had wanted to introduce only selected portions.)

The Court also looked at suspect identification issues. Whittle was identified by one of the robbery witnesses, which the court agreed was done property, and by an officer who was very familiar with him as well.

Whittle's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EXPERT TESTIMONY

U.S. v. Scott, 2017 WL 5664732 (6th Cir. 2017)

FACTS: During Scott's drug trafficking trial, Investigator Hoing (unidentified agency) to "provide specialized testimony regarding the modus operandi of DTOs" (drug trafficking organiztions). The investigator had 40 years of law enforcement experience and had been involved in thousands of narcotics cases. He explained how he could interpret "coded communications based on intercepted intelligence, defendant and confidential informant interviews, and institutional knowledge." From that, he testified that a particular word apparently meant money in recorded conversations presented as evidence.

Scott was convicted and appealed.

ISSUE: Must a witness be an expert to interpret coded drug language for the jury?

HOLDING: No

DISCUSSION: The Court agreed that Hoing "assisted the jury in understanding the defendant's coded conversations and jury was instructed so it could give proper weight to his testimony." Indeed, Hoing explained that he came to learn of specific code words defendants used to reference drugs and drug-related activity.[62]. Where an agent establishes his basis for concluding that a specific word is coded drug language, through personal knowledge, such testimony is permissible under Rule 701.[63] Here, Hoing— a qualified law enforcement agent with 40 years of experience and extensive drug-investigation training—provided information which would assist the trier of fact in understanding drug operations.

Further, an expert witness is permitted to testify under Rule 703 "to an opinion that is supported by inadmissible hearsay evidence." Hoing "provided an independent judgment about the statements made to shed light on what the jury may have witnessed on the pole-camera video the day after the intercepted telephone calls." As such, it was appropriate.

Scott's conviction was affirmed.

CHILD PORNOGRAPHY

U.S. v. Wyatt, 2017 WL 5127333 (6th Cir. 2017)

[62] *See* U.S. v. Dugalic, 489 F. App'x 10 (6th Cir. 2012) ("This court has repeatedly recognized that, in drug cases, officers can testify as to the meaning of code words.") (citations omitted)

[63] *See* U.S. v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006) (in prosecution for conspiracy to distribute cocaine, finding admission of expert testimony from law enforcement warranted as it was relevant and reliable based on agents' extensive experience).

FACTS: In January, 2016, The Tennessee Bureau of Investigation intersected a Craigslist ad from Wyatt that invited a sexual encounter. TBI responded posing as a 14 year old girl. Wyatt initially said she was "too young" but asked for photos and sent nude and semi-nude photos, and asking various qustions. A meeting was set up, despite several more references to the girl's age. He found a "group of police officers' at the meet site and explained he did not believe the girl was real but only arrived to find out who she was.

Wyatt was indicted under several federal charges, and ultimately convicted. He appealed.

ISSUE: May it be assumed that someone who accepts a meeting with someone who is reasonably believed to be underage knows the person is underage?

HOLDING: Yes

DISCUSSION: The court agreed that a reasonable juror could believe he thought the girl was a real minor and that he clearly recognized the illegality of the situation. He had asked for illegal photos and cautioned her not to show his photos to anyone.

The Court upheld his conviction.

EMPLOYMENT

Hylko v. Hemphill, 698 Fed.Appx. 298 (Mem) (6th Cir. 2017)

FACTS: Hylko and Hemphill worked closely together at U.S. Steel, in Michigan. Hylko claimed that Hemphill "began harassing him as soon as they started working together," with Hemphill asking him about his sex life. Hylko was uncomfortable, but went along with it becauase he believed he needed approval Hemphill also touched him sexually several times. Hylko eventually complained and was transferred, although he still had to occasionally interact with Hemphill. He resigned a few months later and filed suit.

The District Court ruled in favor of Hemphill and U.S. Steel, and Hylko appealed.

ISSUE: Does every harassment case require the same treatment?

HOLDING: No

DISCUSSION: Hylko argued that Hemphill was his supervisor and U.S. Steel responsible for his actions. The Court noted that he was not actually Hylko's supervisor although he did direct some of his daily activities, as he could not "effect a significant change in Hylko's employment status." Hylko argued that the company treated male/male harassment more leniently than it did male/female harassment. The Court noted that every harassment case did not need to be treated the same, so long as the response was "reasonably calculated to end the harassment." Hylko was

transferred and Hemphill was disciplined (demoted and reassigned) and the court agreed that was enough, and that it ended the harassment.

The Court upheld the summary judgement.

Bagi/Vajtush v. City of Parma, Ohio, 2017 WL 4857541 (6th Cir. 2017)

FACTS: As a result of disputes over the administration of a promotional test, Bagi, a City of Parma, Ohio, firefighter, wrote a letter expressing his concerns about it. Seven firefighters signed it. Bagi mailed it to himself by certified mail to document the concerns. When his concerns came to pass, he gave the unopened letter to his union head to deliver to the Fire Chief, the union head opened it and discussed the issue with Bagi. Bagi asked for the letter back, but eventually, it was given to the Chief and the Human Resources Director. Assistant Chief Ryan investigated and refuted many of the claims made in the letter.

All of the signatories were disciplined, Bagi most seriously by being suspended for eight shifts. Bagi and Vojtush filed suit under First Amendment retaliation, under 42 U.S.C. §1983. The District Court ruled the letter was not "first Amendment-protected speech because it was issued with reckless indifferences to the falsity of the statements it contained" and gave the City summary judgement. Bagi and Vojtush appealed.

ISSUE: For employee speech to be protected, must it be on a matter of public concern?

HOLDING: Yes

DISCUSSION: The core issue was whether the speech was protected. When the speaker is a public employee, the employee must be speaking "as a private citizen and not as an employee pursuant to his official duties" to be protected.[64] The speech must be "on a matter of public concern."[65] Finally, the speaker "must show that his interest in commenting on the matter of public concern outweighs the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[66] On a separate note, the statements are not protected if made with "intentional or reckless disregard for the truth."[67]

The Court honed in on the second issue, whether the speech is of public concern. In this case, the court agreed that the letter concerned "personnel and internal policy issues, not matters of public concern." Essentially, it argued unfairness, not illegally. The Court affirmed the dismissal.

CIVIL LITIGATION

[64] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[65] Connick v. Myers, 461 U.S. 138 (1983).
[66] Pickering v. Bd. Of Ed. Of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563 (1968).
[67] Westmoreland v. Sutherland, 662 F.3d 714 (6th Cir. 2011).

Grise v. Allen, 2017 WL 4857542 (6th Cir. 2017) (CERT REQ)

FACTS: On January 2, 2011, to quiet a neighbors barking dog, Grise fired his shotgun twice into the ground on his own property. Deputy Allen (Madison County, Kentucky Sheriff's Office) responded to the shots fired call. As the deputy approached, Grise walked outside and identified himself, and explained what had happened. Grise then walked back towards his house. Grise insisted he broke no law. Allen asked if he could go inside with him, and Grise refused. Allen followed Grise onto the porch, and as Grise entered, his wife, standing at the door, fell. (Mrs. Grise suffered from partial paralysis.) Deputy Allen later stated he saw Grise push his wife. Allen grabbed Grise's arm and pulled him outside, and placed him under arrest. He called for EMS, and entered with them, and walked through several ground floor rooms.

Grise was charged with public intoxication, Assault and CCDW (he had a pistol in his pocket at the time). Grise was offered a dismissal if he complied with certain conditions, and he agreed. However, as the matter was being resolved, the prosecution added a stipulation of probable cause as a condition.

Several months later, the Grises filed suit, alleged false arrest and other claims. The Sheriff's Office responded that the stipulation of probable cause defeated essential elements, but Grise denied having stipulated. The criminal charge was still pending, and when Grise returned to court, he explained that he "never intended to stipulate, and would not stipulate, to probable cause." The matter was set for a pretrial, but the prosecution argued that the stipulation was binding and could not be revoked. Ultimately, the trial and appellate courts agred that the stipulation was binding, and the sheriff's Office renewed their dismissal motion.

In sorting out the numerous claims, by both Grise and Mrs. Grise, the Court agreed that her claims were still valid, as she did not stipulate anything. The District Court granted the motion, however, finding that the entry was under both the emergency aid and protective sweep doctrines. The Grises appealed.

ISSUE: If an individual stipulates probable cause, may they pursuit a false arrest claim?

HOLDING: No

DISCUSSION: The Court agreed that judicial estoppel applied in this case, and that the stipulation held, negating all of Grise's claims on his own behalf. That also negated any supervisory liability claims against the Sheriff. With respect to Mrs. Grises' claims, given that she never faced any criminal charges – and thus no opportunity to stipulate, she "never took inconsistent positions with respect to probable cause." The Court agreed that remaining claims, involving an illegal search, were privileged under the emergency aid and protective sweep

doctrines[68] Given that Mrs. Grise had fallen, for whatever reason, he would be expected to go to her aid and enter with EMS. It was further appropriate to do a sweep of adjacent rooms, as well.

The Court affirmed the dismissal with respect to Grise

Khaled (Ghassan and Sonia) v. Dearborn Heights Police Dept., 2017 WL 4411024 (6th Cir. 2017)

FACTS: The Khaleds were involved in disputes with Solovey, who lived next door in Dearborn Heights. In 2014, Officer Bacher (Dearborn Heights PD) w dispatched to "neighbor trouble." He was told by Ghassan it was over trash left between the houses. There was no answer at the Solovey house. Later that same day, they were called back to the house. Khaled complained he was given a ticket for a trash violation when Solovey had "assaulted his daughters," and claimed the officer made racially derogatory remarks as a result. At one point, Khaled's brother brought one of the daughters to the police station to make a complaint, but was refused as he wasn't the minor's parent or guardian.

The Khaleds filed suit against Dearborn and unnamed officers, claiming discrimination on the basis of their Arab heritage. The Court gave summary judgement and the Khaleds appealed.

ISSUE: Does a discrimination lawsuit require proof that an individual is treated differently due to their protected class status?

HOLDING: Yes

DISCUSSION: The Khaleds argued that the initial response (knocking and leaving when Solovey did not answer) was inadequate. However, the Court noted they could not move forward without proof that they were somehow treated differently because of their race or religion, which they could not do. Another officer, who refused the report, did so as a result of a blanket department policy that applied to all minors, and was appropriate. Claims of derogatory comments were not attached to any specific officers and thuse could not be purposed either. And, with no claims against individual officers, there could be no claims against Dearborn Heights, either.
The summary judgment was affirmed.

Anderson v. Sutton (and others) 2017 WL 5508540 (6th Cir. 2017)

FACTS: Sutton, a Corrections officer, was involved in a struggle with an inmate, Anderson. At the end of the fight, she sprayed Anderson in the face several times with OC spray, when Anderson was not resisting and was on the ground. Sutton was immediately placed on leave and quickly fired, and was later convicted of felony assault in Ohio. Anderson sued Sutton and the County. Pro bono counsel was given to Sutton, who cross-claimed against the County which had refused to defend her in the lawsuit, as required by Ohio state law.

[68] Michigan v. Fisher, 558 U.S. 45 (2009).

The County moved for summary judgement, and the trial court denied that motion. At trial, the court ruled for Sutton, finding she'd acted in good faith. The County appealed.

ISSUE: If an officer goes beyond what is allowed, are they entitled to a paid defense?

HOLDING: No

DISCUSSION: The Court agreed that Sutton was entitled to a defense paid for by the county, if she acted in good faith and manifestly not outside the scope of her employment. However, the Court agreed that Sutton crossed the line with the gratuitous and unnecessary use of OC spray at the end of the altercation.

As such, she was not entitled to a paid defense and the court reversed the trial court's decision.

TABLE OF CASES